No. 12624

United States
Court of Appeals
for the Ninth Circuit.

GEORGE T. GOGGIN, as Trustee of the Estate of EUGENE C. BRISBANE, Individually, and BRISBANE & COMPANY, a Limited Partnership, Bankrupts,

Appellant,

vs.

CONSOLIDATED LIQUIDATING CORPORATION and UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GENDEL & RASKOFF,

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617 S. Olive St.,
Los Angeles 14, Calif.

For Appellee Consolidated Liquidating Corporation:

WRIGHT & GARRETT,

621 S. Spring St.,
Los Angeles 14, Calif.

For Appellee: United States of America:

ERNEST A. TOLIN,
United States Attorney,

CLYDE D. DOWNING and

TOBIAS G. KLINGER,
Assistants U. S. Attorney,

600 U. S. Post Office and Court House Bldg.
Los Angeles 12, Calif.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy No. 44467-B

In the Matter of

EUGENE C. BRISBANE, d.b.a. BRISBANE & COMPANY,

Debtor.

ORIGINAL PETITION IN PROCEEDINGS UNDER CHAPTER XI

To the Honorable Judges of the District Court of the United States for the Southern District of California, Central Division:

The petition of Eugene C. Brisbane, doing business as Brisbane & Company, having his principal place of business at 8653 Atlantic Boulevard, South Gate, California, respectfully represents:

1. Your petitioner has had his principal place of business at 8653 Atlantic Boulevard, South Gate, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district and was engaged in the manufacture of articles of a machine shop.

2. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

3. That your petitioner is unable to pay his

debts as they mature and proposes the following arrangement with his unsecured creditors:

A. A receiver shall be placed in charge of the assets pending the confirmation of an arrangement hereinafter proposed or until further order of the Court.

B. The principal assets of this debtor consist of certain real estate and building located at 8653 Atlantic Boulevard, South Gate, California, together with a large amount of furniture, fixtures and equipment necessary to operate said plant, of the approximate value of $430,000.00. In addition to said assets, your petitioners owns certain assets as follows:

Home located at 1638 Shenendoah Road, San Marino, California, of the valuation of $60,000.00, which is held in joint tenancy with his wife, Ruth Brisbane.

Furniture located therein, of the valuation of $25,000.00.

A furnished home on Catalina Island, Avalon, California, of the value of $40,000.00.

A schooner valued at $35,000.00.

Accounts receivable, mostly owing by the United States Government, in the sum of approximately $130,000.00.

That the liabilities of the debtor are approximately stated as follows:

The United States Government Collector of Internal Revenue claims that the debtor is indebted to said agency in the sum of $257,000.00, which the debtor seriously disputes and believes that upon a

hearing thereof as to the validity of such claim that it would be reduced to not more than $75,000.00.

Other liabilities are as follows:

Accounts payable, $146,000.00.

Notes payable, $70,000.00.

Reconstruction Finance Corporation, $60,000.00.

United States Government, $10,000.00.

Therefore, it appears that the fair value of the debtor's assets is almost double the amount of liabilities which will eventually be allowed and if debtor is permitted to reorganize his affairs, not only would the creditors be paid in full, but a substantial equity will remain in the business for the debtor.

That your petitioner has a very valuable good will in said business and has made large sums of money in the operation of said business.

It is the debtor's plan to incorporate said business and to issue preferred and common stock to investors, which should produce sufficient working capital to permit the company to recommence operation of its business and provide a substantial payment to creditors within a very short time.

That by operation under the proper supervision of a creditors' committee, composed of the principal unsecured creditors, the debtor proposes, from the gross profits of the business, to pay the following debts in the following order of priority.

(a) The necessary expenses in the operation of the business.

(b) The actual necessary costs of administration of the debtor estate as fixed by the court, in-

cluding fees of the attorneys for the debtor, the receiver, the assignee for the benefit of creditors and the necessary amount to be expended for filing and indemnity fees.

(c) The payment of the United States Government in such amount as allowed by the Court and on such terms and conditions as the United States Government will agree to.

(d) That after all claims entitled to priority have been provided for, the payment of the claims of general unsecured creditors.

It is proposed under the above plan to pay all of the general unsecured creditors in full within such time as will be agreeable to such creditors, or a majority in number and amount thereof, but because of the short length of time within which the debtor must prepare this petition, this plan will be amended to set forth the manner and method of payment of unsecured creditors in greater detail after such agreement has been reached.

C. That it is contemplated that the Court will retain jurisdiction for all purposes until the arrangement has been carried out as hereinabove set forth.

D. That upon completion of the entire arrangement and the satisfaction of all creditors, these proceedings shall thereupon be terminated and the debtor shall then be entitled to manage his affairs.

4. That your petitioner is unable to file his schedules A and B at this time, as set forth in the affidavit filed herewith praying for ten days within which to file his schedules A and B, and your peti-

tioner, upon the granting of the relief prayed for therein, will file his Schedules A and B within the time allowed by the Court.

5. That the statement hereto annexed marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of his executory contracts as provided for by the provisions of said Act.

6. That in December of 1945, your petitioner made an assignment for the benefit of creditors to M. W. Engleman, for the purpose of reorganizing his affairs outside of the jurisdiction of the Federal Court. That your petitioner is presently confined to the County Jail of Los Angeles County, State of California, as a result of a conviction in the United States District Court of Federal offenses and is taking proceedings for the purpose of appealing said conviction and sentence and is expecting to be released on bail within the next few days.

That without notice to your petitioner, the said M. W. Engleman, as assignee for the benefit of creditors, engaged Milton J. Wershow Co., as auctioneers, to auction off the real property, building and equipment located at 8653 Atlantic Boulevard, South Gate, California, which as stated above has a valuation of at least $430,000.00. That said auction sale is set for Tuesday, July 9, 1946, starting at 9:30 a.m. That said auction sale is contrary to the agreement between the said M. W. Engleman and the said petitioner, as to the method of liquidating the debtor's affairs and if permitted to

proceed will prevent the debtor from reorganizing his company and effecting the arrangement hereinabove proposed. That creditors will suffer great detriment as a result thereof and will not receive payment in full of their claims if said sale is permitted to proceed as scheduled. That petitioner prays that said M. W. Engleman, as Assignee for the benefit of creditors, and Milton J. Wershow Co., auctioneers, be enjoined and restrained from disposing and selling, or attempting in any way to dispose of or sell or in any way interfere with any of the property, assets or effects in their possession pending further order of the Court hereof.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Act of Congress relating to bankruptcy.

/s/ EUGENE C. BRISBANE.

FRANCIS F. QUITTNER and

BEN L. BLUE,

By /s/ FRANCIS F. QUITTNER,
Attorneys for Debtor.

State of California,
County of Los Angeles—ss.

I, Eugene C. Brisbane, doing business as Brisbane & Company, the petitioner named in the foregoing petition, do hereby make solemn oath that

the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ EUGENE C. BRISBANE.

Subscribed and sworn to before me this 8th day of July, 1946.

[Seal] /s/ FRANCIS F. QUITTNER,
Notary Public in and for
Said County and State.

Exhibit 1

Statement of Executory Contracts

There are no executory contracts.

/s/ EUGENE C. BRISBANE.

State of California,
County of Los Angeles—ss.

I, Eugene C. Brisbane, doing business as Brisbane & Company, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ EUGENE C. BRISBANE.

Subscribed and sworn to before me this 8th day of July, 1946.

[Seal] /s/ FRANCIS F. QUITTNER,
Notary Public in and for
Said County and State.

[Endorsed]: Filed July 8, 1946.

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE UNDER SECTION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on July 8, 1946, before the said Court the petition of Eugene C. Brisbane, dba Brisbane & Company, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Hugh L. Dickson, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Eugene C. Brisbane, dba Brisbane & Company, shall attend before said referee on July 15, 1946, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Leon R. Yankwich, Judge

of said Court, and the seal thereof, at Los Angeles, in said District, on July 8, 1946.

EDMUND L. SMITH,
Clerk.

By /s/ F. BETZ,
Deputy Clerk.

[Endorsed]: Filed July 8, 1946.

[Title of District Court and Cause.]

ORDER OF ADJUDICATION

It Appearing that a petition under Section 322 of the Bankruptcy Act was filed by the above debtor on the 8th day of July, 1946, and that on the same date there was a general order of reference to the undersigned Referee in Bankruptcy; and

It Further Appearing that the debtor filed a Consent to Adjudication in Bankruptcy on August 13, 1946,

It Is Hereby Ordered that the said Eugene C. Brisbane, dba Brisbane & Company, be and he hereby is adjudged a bankrupt according to the Acts of Congress relating to bankruptcy.

Dated: August 15, 1946.

/s/ HUBERT F. LOUGHARN,
Referee in Bankruptcy.

[Endorsed]: Filed August 16, 1946.

[Title of District Court and Cause.]

ORDER OF ADJUDICATION AND ORDER TO FILE SCHEDULES

A proceeding under Chapter XI, Section 322, of the Bankruptcy Act having been filed herein on the 8th day of July, 1946, by Eugene C. Brisbane, doing business as Brisbane & Company, and an order of adjudication having been entered herein on the 15th day of August, 1946, and it appearing that the said Eugene C. Brisbane is the only general partner in the above-entitled Brisbane & Company, a limited partnership composed of Eugene C. Brisbane, general partner, and Arthur H. Skaer and Herndon J. Norris, limited partners; and it further appearing that an adjudication of the said partnership should be entered herein under the provisions of Section 5 (i) of the Bankruptcy Act;

It Is Ordered that the said partnership, Brisbane & Company, a limited partnership composed of Eugene C. Brisbane, general partner, and Arthur H. Skaer and Herndon J. Norris, limited partners, be, and it hereby is adjudged a bankrupt according to the Acts of Congress relating to bankruptcy.

It Is Further Ordered that the said bankrupt shall file herein, in triplicate, its schedules, within five days from this date.

Dated: January 24, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed January 24, 1947.

In the District Court of the United States, Southern District of California, Central Division

No. 44,467-B

In the Matter of

Eugene C. Brisbane, individually, doing business as Brisbane & Co., Brisbane & Co., a limited partnership,

Bankrupt.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR SEGREGATION OF ASSETS AND CLAIMS

Upon Reading and filing the verified petition of George T. Goggin, as Trustee in the within bankruptcy proceedings for an order of segregation of assets and claims, and upon motion of Martin Gendel, one of his counsel, and after due written notice to all creditors in the within proceedings, a hearing was duly held before the undersigned Referee, in his courtroom, located on the 3rd floor of the Federal Building, Los Angeles, California, at the hour of 10 o'clock a.m., on December 18, 1947, and no objections having been made or presented to the said petition, and good cause appearing therefor, the undersigned Referee does hereby make the following Findings of Fact, Conclusions of Law and Order:

Findings of Fact

1. The undersigned Referee finds that in the administration of the within estate there are cer-

tain assets attributable to Brisbane & Co., a limited partnership, composed of Eugene C. Brisbane, as general partner, and originally Herndon J. Norris and Arthur H. Skaer, as limited partners, and just prior to the commencement of the bankruptcy proceedings of Eugene C. Brisbane as general partner, and Arthur H. Skaer, only, as limited partner; that the funds attributable to the said Brisbane & Co., a limited partnership, are in accordance with the itemization set forth in Exhibit "A" of the petition above referred to, and represent the net receipts received by the Trustee in the sum of $119,368.37, prior to allocation of disbursements by the Trustee.

2. The undersigned Referee finds that in the administration of the within estate there are certain assets attributable to Eugene C. Brisbane, personally, in accordance with the itemization set forth in Exhibit "A" of the petition above referred to, and represent the net receipts received by the Trustee in the sum of $76,868.54, prior to allocation of disbursements by the Trustee.

3. The undersigned Referee further finds that the liabilities of the within estate shall be segregated so that upon the payment of any claims or dividends thereon, the Trustee shall first make payments thereof only from assets attributable to the entity against which the claim should be properly made and allowed, to wit: claims against Brisbane & Co., a limited partnership, shall be paid only out of funds attributable to the said partnership, being

the entity in which the business of Brisbane & Co., was conducted; that claims against Eugene C. Brisbane, individually, shall first be payable only out of funds attributable to the personal assets of Eugene C. Brisbane; that only in the event of a surplus of assets of either entity shall claims be paid out of funds attributable to an entity against which the creditor would not have an original claim.

Conclusions of Law

From the above Findings of Fact, the Undersigned Referee concludes, as a matter of law, that the petition of the Trustee for a segregation of assets and claims, should be granted, and that the claims against Brisbane & Co., a limited partnership, shall be paid first only out of funds attributable to Brisbane & Co., a limited partnership, and claims against Eugene C. Brisbane should be payable first only out of funds attributable to Eugene C. Brisbane, individually.

Order

From the above Findings of Fact, and Conclusions of law, the undersigned Referee does hereby order that the Petition of George T. Goggin, as Trustee in Bankruptcy, for an order of segregation of assets and claims be, and the same is hereby granted, and the assets of Brisbane & Co., a limited partnership, and of Eugene C. Brisbane, individually, are hereby allocated, as to assets now in the hands of the Trustee, in accordance with the analysis set forth in Exhibit "A" of the petition here-

inabove referred to, and specifically as of November 6, 1947, $119,368.37 is determined as attributable to Brisbane & Co., a limited partnership, and $76,868.54 as hereby determined attributable to Eugene C. Brisbane, individually.

It Is Further Ordered that the claims shall be segregated and paid first from the entity against which said claims are properly allowable.

Dated this 22nd day of December, 1947.

/s/ HUGH L. DICKSON,

[Endorsed]: Filed December 19, 1947.

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE RE: CONSOLIDATED STEEL CORPORATION

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

Comes now your petitioner, George T. Goggin, and respectfully represents as follows:

I.

That he is the duly elected, qualified and acting Trustee in the within bankruptcy proceedings.

II.

That upon investigating the books and records of the bankrupt, it appears that the Shipbuilding Di-

vision of the Consolidated Steel Corporation is indebted to the bankrupt, on an open book account in the net sum of $20,390.82; it further appears that two contract termination accounts now exist between the estate and the aforesaid Consolidated Steel Corporation, predicated upon Purchase Order #H-402, upon which the bankrupt claims $2,212.31, and which has been audited by the Consolidated Steel Corporation in an approved amount of at least $1,112.44, and, upon Purchase Order #H-135, in which the estate claims $47,229.34, and which has been audited by the aforesaid respondent in the sum of $10,534.05; on the latter two claims the within estate urges that the aforesaid respondent is indebted in the total amount of the contract termination claims in the sum of $49,441.65, instead of the audited amounts of $11,646.49.

III.

That Consolidated Steel Corporation admits that it is now indebted in the liquidated amount of $20,390.82, and in spite of demand made therefor, has failed and refused to pay the said monies to your petitioner, as Trustee in the within proceedings; however, Consolidated Steel Corporation does not claim any right, title or interest in or to said monies, and therefore, should be directed to forthwith turn over said monies to your petitioner, as Trustee; that as to the termination claims of $49,441.65, Consolidated Steel Corporation should be required to either pay the said termination claims or to show good cause why it is not indebted to the within estate in said amount or any part thereof.

Wherefore, your petitioner prays that this Court issue an order directing the Consolidated Steel Corporation to forthwith appear before this Court and show cause why it should not be required to turn over to your petitioner, as Trustee, all monies properly owing from the within corporation to the within estate pursuant to the facts set forth hereinabove.

Dated: March 29, 1948.

/s/ GEORGE T. GOGGIN,
Trustee,
Petitioner.

/s/ MARTIN GENDEL,
Of Counsel for Trustee.

Duly verified.

[Endorsed]: Filed March 31, 1948.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

To Consolidated Steel Corporation, 5700 South Eastern Avenue, Los Angeles, California:

Upon Reading And Filing the verified petition of George T. Goggin, as trustee in the within bankruptcy proceedings, and upon the motion of Martin Gendel, one of his counsel, and good cause appearing therefrom,

It Is Ordered that the Consolidated Steel Corporation, a corporation, is hereby directed to appear

before the Hon. Hugh L. Dickson, Referee in Bankruptcy, in his courtroom on the 3rd floor of the Federal Building, Los Angeles, California, on the 22nd day of April, 1948, at the hour of 10 a.m., or as soon thereafter as counsel can be heard, and then and there to show cause why the prayer of the aforesaid petition for order to show cause, dated the 29th day of March, 1948, a copy of which accompanies the within order to show cause, should not be granted, and why the Consolidated Steel Corporation should not be directed to pay to the trustee in the within estate monies owing to the estate by virtue of dealings between the said Consolidated Steel Corporation and the bankrupt herein.

This order to show cause may be served by placing in the mail a copy of the within order to show cause, and petition for order to show cause, directed to Consolidated Steel Corporation, at its address, 5700 South Eastern Avenue, Los Angeles, California.

Said copies of the within order to show cause and petition to be deposited no later than the 17th day of April, 1948.

Dated this 31st day of March, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed March 31, 1948.

[Title of District Court and Cause.]

PETITION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE

To The Honorable Hugh L. Dickson, Referee In Bankruptcy:

Comes now the United States of America by and through its attorneys, James M. Carter, United States Attorney, Clyde C. Downing, Assistant United States Attorney, Acting Chief, Civil Division, and Tobias G. Klinger, Special Assistant to the United States Attorney, and respectfully petitions for leave to intervene in the hearing scheduled before this Court on April 22, 1948, at 10:00 o'clock a.m., on the Petition for Order to Show Cause re: Consolidated Steel Corporation, filed by the Trustee herein, and represents as follows:

I.

That the United States of America has a direct and substantial interest in said proceeding in that any sums which Consolidated Steel Corporation may be required to pay under the proposed Order to Show Cause would result in claims for reimbursement by Consolidated Steel Corporation against the United States of America pursuant to the provisions of the pertinent cost-plus-a-fixed-fee contract between said Consolidated Steel Corporation and the United States Maritime Commission.

II.

That the United States of America has a direct

and substantial interest in said proceeding in that, pursuant to the provisions of Public Law 319, commonly known as the Anti-Kickback Statute, it has asserted, through its authorized agencies, prior to the commencement of the within bankruptcy proceeding, a substantial and bona fide claim to the funds or accounts which the Trustee seeks to have Consolidated Steel Corporation pay to the bankrupt estate.

III.

That the United States of America has a direct and substantial interest in said proceeding in that it is informed and believes that one of the principal issues which may be presented to this Court for determination will be the constitutionality of said Anti-Kickback Act, Public Law 319, which was duly enacted by the Congress and approved by the President in order to protect the United States against those who seek to defraud the United States in any of the ways set forth in said Statute.

Wherefore, your petitioner prays that this Court enter an Order granting the United States of America leave to intervene as a party-respondent in the Show Cause Hearing that is scheduled for April 22, 1948, at 10:00 o'clock a.m.

JAMES M. CARTER,
United States Attorney.

/s/ CLYDE C. DOWNING,
Assistant U. S. Attorney,
Acting Chief, Civil Division.

/s/ TOBIAS G. KLINGER,
Special Assistant to the
United States Attorney.

It Is So Ordered:

This — day of — April, 1948.

.....,
Referee in Bankruptcy.

[Endorsed]: Filed April 22, 1948.

[Title of District Court and Cause.]

OBJECTIONS OF UNITED STATES TO ORDER TO SHOW CAUSE

To The Honorable Hugh L. Dickson, Referee In Bankruptcy:

Comes now the United States of America by and through its attorneys, James M. Carver, United States Attorney, Clyde C. Downing, Assistant United States Attorney, Acting Chief, Civil Division, and Tobias G. Klinger, Special Assistant to the United States Attorney, and objects to the proposed Order to Show Cause on the grounds:

I.

That prior to the commencement of the within bankruptcy proceeding the United States of America had, in accordance with the provisions of Public Law 319, (79th Cong. 2nd Sess.), directed Consolidated Steel Corporation to withhold payment to Brisbane & Company of the sums claimed herein;

that said Statute duly enacted by the Congress and approved by the President, has for its purpose the protection of the United States against those who defraud it, and is in all respects a valid and constitutional enactment; that the aforesaid withholding order constitutes a complete bar to the proposed Order to Show Cause;

II.

That the United States of America, prior to the institution of the within bankruptcy proceedings, had asserted a substantial and bona fide claim of ownership of the property involved adverse to the claim now asserted by the Trustee in Bankruptcy; that as such claimant the United States had not then, nor has it thereafter actually or impliedly consented to a determination of title thereto by the Bankruptcy Court but, on the contrary, has consistently objected thereto and now so objects; that the disputed property was not, and is not now, actually or constructively in the possession of the Bankruptcy Court; that the issue of title to and ownership of said monies cannot properly be determined adversely to the United States in a summary proceeding by this Court, but can only be properly determined in a plenary proceeding duly authorized and filed in a court having jurisdiction; and that such a plenary proceeding should not be authorized by this Court unless and until the Trustee establishes to the satisfaction of this Court that the institution and prosecution of such a plenary proceeding would be in the best interest of the bankrupt estate.

Wherefore, your petitioner prays that the Order to Show cause be dismissed.

JAMES M. CARTER,
United States Attorney.

/s/ CLYDE C. DOWNING,
Assistant U. S. Attorney,
Acting Chief, Civil Division,

/s/ TOBIAS G. KLINGER,
Special Assistant to the United States Attorney,
Attorneys for United States.

[Endorsed]: Filed April 22, 1948.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES

Statement of Facts

Consolidated Steel Corporation has been ordered to show cause why it should not pay over to the Trustee in Bankruptcy of the estate of Eugene C. Brisbane $20,390.82 allegedly owing on an open book account and $49,441.65 allegedly owing on the basis of Brisbane's audit on purchase orders H-402 and H-135, now in the process of contract termination before the Settlement Section of the Maritime Commission. Consolidated Steel Corporation has audited these last two claims at a figure of $11,646.49. While this last figure was obtained as the result of

a joint audit made by Consolidated Steel Corporation and an auditor for the Maritime Commission and has been certified to the Settlement Section of the Maritime Commission by Consolidated Steel Corporation as a proper allowance to Brisbane under these purchase orders, it must be emphasized that Consolidated Steel Corporation does not thereby admit that $11,646.49 is owed by it to Brisbane on these termination claims, since the figure is subject to revision upward or downward by the Settlement Section accordingly as it accepts the audits of Brisbane or of Consolidated Steel Corporation, or for reasons of its own chooses to accept neither and adopts a higher or lower figure than either Brisbane's or Consolidated's audits. The amounts allegedly owing by Consolidated to Brisbane are based upon certain war production subcontracts held by Brisbane. The General Accounting Office and the Maritime Commission of the United States have, under the authority of the Anti-Kickback Act, 41 USC 51, ordered Consolidated Steel Corporation not to make any further payments to Brisbane until authorized to do so by them. These "stop orders" are based on the following facts: McBurney, a purchasing agent of Consolidated Steel Corporation, accepted from Brisbane money in return for McBurney's giving to Brisbane certain war production subcontracts. Under the Anti-Kickback Act it is conclusively presumed that the amount of such "kickbacks" is an excess item of cost to the Government and that the Government is entitled to recover such amount either by a direct

suit against the receipient of the "kickback" or by ordering the prime contractor to withhold payments to the subcontractor which made the illegal "kickback," in the amount of the "kickbacks."

Consolidated Steel Corporation, the prime contractor, has therefore refused to make any further payments to Brisbane until such time as the Maritime Commission and the General Accounting Office release their "stop orders."

In addition to the defense of the Anti-Kickback Act, Consolidated Steel Corporation also advances the defenses as set out below:

I.

Consolidated Steel Corporation Owes Brisbane Nothing Because All Further Payment Has Been Prohibited by the General Accounting Office and the Maritime Commission

The issue of constitutionality of the Anti-Kickback Act has already been thoroughly briefed earlier in these proceedings. The attention of the court is drawn to the briefs filed in this court on September 24, 1947, by Consolidated Steel Corporation and on September 26, 1947, by the United States in support of their petitions for review of an earlier order of Referee Dickson in which he declared the Anti-Kickback Act to be unconstitutional.

II.

The Termination Claims Are Unliquidated

The face of the petition of the Trustee herein

shows the existence of a dispute regarding the amount due under the termination claims. Consolidated Steel Corporation denies the allegation of the Trustee in Bankruptcy that it admits in any way that the sum of $11,646.49 or any other sum is owing by it to Brisbane until such time as the Settlement Section of the Maritime Commission has made its determination of the amount due. Under the provisions of the Termination of War Contracts Act, 41 USC 101, and the regulations thereunder, when a war contract has been terminated, the subcontractor (in this case Brisbane) submits a claim for payment thereunder to the prime contractor. If the amount of the claim is less than a thousand dollars, the prime contractor can pay the amount without a further audit. If it is more than a thousand dollars, the claim is audited by the prime contractor, which certifies the amount it determines to be properly owing to the Maritime Commission's Settlement Section. Payment to the subcontractor will be made by the prime contractor on the basis approved by the Maritime Commission which, in turn, remunerates the prime contractor. Nothing is owing by the prime contractor until the approval of the Settlement Section of the Maritime Commission has been obtained.

The Settlement Section of the Maritime Commission has not as yet approved the audit of Brisbane or of Consolidated Steel Corporation on purchase orders H-402 and H-135. Therefore, wholly apart from the provisions of the Anti-Kickback Act, noth-

ing is owing from Consolidated Steel Corporation to Brisbane under these purchase orders.

III.

The Order to Show Cause Is Directed Against Monies Against Which the United States Has a Bona Fide Claim and Is Therefore Without the Jurisdiction of This Court

The question of the authority of any court to issue any order against money or property held or claimed by the United States, constituting as it does an order against the United States, has been thoroughly discussed in the brief of the Government previously filed herein on September 26, 1947. Further discussion of the point at this time would serve no purpose.

IV.

The Brisbane-Consolidated Steel Corporation Contracts Are Void Because of Fraud

It is a fundamental principle of agency law that, where an agent represents both parties to the contract without the knowledge of one of the parties thereto, such party may, upon discovering the dual agency, and even without a proof of any loss to him, rescind the contract. Of course, where the rescinding principal has received any benefits under the contract, such benefits must be tendered to the other principal or payment made therefor on a quantum meruit basis if the return thereof is impossible.

Gordon v. Beck (1925), 196 Cal. 768, 771-772;

Wilson v. Southern Pacific Land Co.
(1923), 61 Cal. App. 545;

Newell-Murdock Realty Co. v. Wickham
(1920), 183 Cal. 39, 44;

Burke v. Bours
(1891), 92 Cal. 109, 28 P. 57;

Boulenger v. Morison,
88 Cal. App. 664, 264 P. 256;

Alger v. Anderson
(1897), 78 Fed. 729;

Alger v. Keith
(1900), 105 Fed. 105;

Annotation, 48 A.L.R. 917.

In the principal case McBurney was the agent of Consolidated Steel Corporation and received in kickbacks an amount in excess of the total amount here in litigation. Furthermore, Brisbane himself received substantial amounts in excess of the legal and proper amounts due under his subcontracts by virtue of his collusion with the agent of Consolidated Steel Corporation. Under the law of agency the contract could be rescinded by Consolidated Steel Corporation and payments to Brisbane made solely on a quantum meruit basis. Amounts in excess of the quantum meruit have already been paid, so nothing is owing. A formal notice of rescission by Consolidated Steel Corporation upon its discovery of the dual agency was obviously unnecessary

in view of the fact that Consolidated was already withholding payments from Brisbane under the authority of the government "stop orders."

Under the fundamental principles of the law of fraud and deceit Brisbane and McBurney have conspired to obtain from Consolidated Steel Corporation amounts substantially in excess of the amounts properly due under the Brisbane-Consolidated Steel Corporation contracts. Consolidated Steel Corporation has been defrauded by Brisbane of amounts substantially in excess of the amounts here in issue. All of the elements of fraud were present in the dealings between Consolidated Steel Corporation and Brisbane: A material representation was made; the representation was false; the representation was known to be false by Brisbane; the representation was made with the intent to induce Consolidated Steel Corporation to act in reliance thereon; Consolidated Steel Corporation actually relied thereon; in doing so, Consolidated Steel Corporation acted reasonably; and, finally, Consolidated Steel Corporation suffered substantial injury.

Hobart v. Hobart Estate Company
(1945), 26 Cal. 412, 422, 159 Pac. (2d) 958.

Brisbane, furthermore, would be liable to Consolidated Steel Corporation for any loss suffered by Consolidated Steel Corporation as a result of Brisbane's inducing the servant or agent of Consolidated Steel Corporation to breach his duty to Consolidated Steel Corporation, in the amount of the loss suffered by the corporation.

13 B.R.C. 771.

Wholly apart from the Anti-Kickback Act, and based strictly on the law of agency and fraud, Consolidated Steel Corporation has a valid defense against the claims of Brisbane's Trustee.

V.

The Bankruptcy Court Lacks Jurisdiction to Order Payment of the Amounts Claimed by the Trustee

As outlined above, there are substantial questions of both state and federal law as to whether Consolidated Steel Corporation owes or must pay anything to the estate of Brisbane. The matter is not within the summary jurisdiction of a referee in bankruptcy unless such jurisdiction is accepted by all of the parties thereto. The United States has earlier in these proceedings indicated that it will not waive its right to a plenary suit on these issues and Consolidated Steel Corporation has done likewise, and hereby reiterates its position. The question of summary and plenary jurisdiction has been discussed earlier in these proceedings, in the briefs of Consolidated Steel Corporation and of the United States already referred to above.

Respectfully submitted,

WRIGHT & GARRETT,

By /s/ WALTER L. M. LORIMER,
Attorneys for Consolidated
Steel Corporation.

[Endorsed]: Filed April 22, 1948.

[Title of District Court and Cause.]

NOTICE

To George T. Goggin, Trustee of Brisbane & Company and Eugene C. Brisbane, and to the United States of America, and to Gendel & Chichester and James M. Carter, their respective counsel:

You Are Hereby Notified that the name of Consolidated Steel Corporation has been changed to "Consolidated Liquidating Corporation."

Dated:

WRIGHT & GARRETT,

By /s/ WALTER L. M. LORIMER,
Attorneys for Consolidated
Liquidating Corporation.

Receipt of Copy acknowledged.
[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

STIPULATION

Come now George T. Goggin, as Trustee of Brisbane & Company and Eugene C. Brisbane, Consolidated Liquidating Corporation (formerly known as Consolidated Steel Corporation), and the United States of America, and through their respective counsel do hereby stipulate as follows:

That unless the United States Maritime Commission should require further processing of purchase orders Nos. H-402 and H-135, and without admission by Consolidated Liquidating Corporation or the

United States of liability for the payment thereof, the Trustee in bankruptcy will accept from Consolidated Liquidating Corporation as payment in full on purchase order No. H-402 the sum of $1,370.72, and on purchase order No. H-135 the sum of $4,722.75.

It is further stipulated that without admission of liability for the payment thereof, the net amount owing from Consolidated Liquidating Corporation on the open-book account of Brisbane & Company is the sum of Twenty Thousand Three Hundred and Ninety Dollars and Eighty-two Cents ($20,390.82).

Dated: March 22, 1949.

GEORGE T. GOGGIN, as
Trustee in Bankruptcy.

By /s/ MARTIN GENDEL,
Of Counsel for Trustee.

JAMES M. CARTER,
United States Attorney.

By /s/ TOBIAS G. KLINGER,
Assistant U. S. Attorney.

CONSOLIDATED LIQUIDATING CORPORATION,

By WRIGHT & GARRETT,

By /s/ WALTER L. M. LORIMER,
Attorneys for Consolidated
Liquidating Corporation.

[Endorsed]: Filed March 28, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING TRUSTEE'S PETITION AGAINST CONSOLIDATED LIQUIDATING CORPORATION (FORMERLY CONSOLIDATED STEEL CORPORATION)

George T. Goggin, as trustee in bankruptcy, heretofore filed a verified petition for an order to show cause re Consolidated Steel Corporation, said petition being dated on or about March 29, 1948; thereafter and on or about March 31, 1948, the Honorable Hugh L. Dickson, as Referee in Bankruptcy, issued an order to show cause upon said petition which was duly served upon the Consolidated Steel Corporation and a hearing was held thereon on the 22nd day of April, 1948, Wright & Garrett, Attorneys at Law, by Walter L. M. Lorimer, appearing as attorneys for Consolidated Liquidating Corporation (formerly known as Consolidated Steel Corporation), and Martin Gendel of counsel appearing as attorney for George T. Goggin as Trustee. At the same time the United States of America filed a petion for leave to intervene in said proceedings and said petition was granted and the United States allowed to appear as intervener, being represented by James M. Carter as United States Attorney, by Tobias G. Klinger of counsel; after the taking of testimony and the hearing of argument, the matter was duly submitted and the parties thereto there-

after entered into a written stipulation dated March 22, 1949.

Now, Therefore, based upon the aforsesaid petitions, order to show cause, evidence, stipulations and argument, the undersigned Referee hereby makes the following findings of fact, conclusions of law, and order:

Findings of Fact

I.

That prior to the commencement of the within bankruptcy proceeding, Brisbane & Co., a partnership, bankrupt herein, entered into written purchase orders with the Consolidated Liquidating Corporation on No. H-402 and No. H-135.

II.

That subject to the possible requirement of the United States Maritime Commission of further processing, Consolidated Liquidating Corporation is obligated to pay the Trustee in Bankruptcy the sum of $1370.72 on purchase order No. H-402, and the sum of $4,722.75 on purchase order No. H-135.

III.

That the Consolidated Liquidating Corporation is indebted to Brisbane & Co. on an open book account in the sum of $20,390.82.

IV.

That in connection with the creation of the indebtedness from Consolidated Liquidating Corporation to the bankrupt herein, Consolidated Liquid-

ating Corporation was a prime contractor on contracts with the United States Maritime Commission, and the bankrupt herein was a subcontractor.

V.

That on June 12, 1946, the United States Maritime Commission, and on May 19, 1947, the General Accounting Office, pursuant to the provisions of Title 41, U. S. C., Sec. 51, directed Consolidated Steel Corporation to withhold payment of said monies to Brisbane & Company.

VI.

That neither the United States of America nor the Consolidated Liquidating Corporation has any substantial bona fide adverse claim in and to the said moneys, and the said moneys are being held by Consolidated Liquidating Corporation on behalf of George T. Goggin as Trustee of Brisbane & Company, bankrupt herein.

Conclusions of Law

From the above findings of fact, the undersigned Referee does hereby make the following conclusions of law:

I.

That Consolidated Liquidating Corporation is obligated to forthwith pay to George T. Goggin, as trustee in the within bankruptcy estate, the sum of $26,484.29.

II.

That neither Consolidated Liquidating Corpora-

tion nor the United States of America has any claim in and to said moneys.

Order

From the foregoing findings of fact and conclusions of law,

It Is Hereby Ordered that Consolidated Liquidating Corporation forthwith pay to George T. Goggin, as Trustee in the within bankruptcy proceeding, the sum of $26,484.29.

Dated: April 12, 1949.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

Approved as to Form:

JAMES H. CARTER,
United States Attorney,

By /s/ TOBIAS G. KLINGER,
Assistant United States Attorney, Attorneys for the United States of America.

WRIGHT & GARRETT,
By /s/ WALTER L. M. LORIMER,
Attorneys for Consolidated Liquidating Corporation (formerly known as Consolidated Steel Corporation).

[Endorsed]: Filed April 8, 1949.

[Title of District Court and Cause.]

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO PETITION FOR REVIEW OF ORDER

Comes now the United States of America and respectfully applies for an order extending the time to petition the United States District Court for a review of the order entered herein April 12, 1949, until and including ten days from and after April 22, 1949, namely, May 2, 1949.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
Assistant United States Attorney,

/s/ TOBIAS G. KLINGER,
Assistant United States Attorney,
Attorneys for United States.

It Is So Ordered.

Dated this 13th day of April, 1949.

/s/ HUGH L. DICKSON,
Referee.

[Endorsed]: Filed April 13, 1949.

gress of the United States within the powers delegated to it under the Constitution of the United States. Said Order of the Referee was and is erroneous in that until the said orders of the Maritime Commission and the General Accounting Office have been duly withdrawn, rescinded, terminated, amended, or modified, petitioner is under no liability to pay any sums to the bankrupt, or to his trustee.

III.

The Referee has ordered petitioner to pay the sum of $6,093.47 in satisfaction of the bankrupt's claims on purchase orders No. H-402 and No. H-135. Since any amounts which petitioner is legally obligated to pay with respect to said claims are reimbursable to petitioner, by the Maritime Commission, upon payment thereof by petitioner, said claims have been referred to said Commission for its determination of the amounts which it will regard as reimbursable. The trustee has stipulated that he will accept said sum of $6,093.47 on behalf of the bankrupt, in satisfaction of said claims. However, said sum does not represent a liquidated amount or an agreed-upon balance due under said purchase orders or on said claims; and neither petitioner nor the Maritime Commission has agreed that the bankrupt is entitled to receive said sum of $6,093.47, or any part thereof, on either of said claims. Neither petitioner nor the United States has consented to the Referee's jurisdiction in determination of the amounts due on said purchase orders. Said Order was and is erroneous in that

the determination of the balances due on said purchase orders is not within the jurisdiction of the bankruptcy court without the consent of all parties to these proceedings, and without its having in its possession any money with regard to which such determination can apply.

IV.

Paragraph VI of Findings of Fact in the Referee's Order reads as follows:

"That neither the United States of America nor the Consolidated Liquidating Corporation has any substantial bona fide adverse claim in and to the said moneys, and the said moneys are being held by Consolidated Liquidating Corporation on behalf of George T. Goggin as Trustee of Brisbane & Company, bankrupt herein."

Said finding of fact is erroneous in that it implies that a fund exists which petitioner is holding. There is nothing in the pleadings, evidence, or record before the Referee upon which to base a finding that such a fund exists, or that petitioner holds any fund or moneys on behalf of George T. Goggin as trustee for the bankrupt.

Said finding of fact is also erroneous in so far as it implies that the defenses raised by the United States and petitioner in the within proceedings are not substantial, bona fide, or adverse to the claims of trustee.

V.

Said order was and is erroneous in that, wholly apart from the orders of the Maritime Commission

and the General Accounting Office referred to above in Paragraph II hereof, nothing is, or was at the time of said order of the Referee owing from petitioner to the bankrupt herein, since the bankrupt herein conspired with an employee of petitioner to defraud petitioner, and as a result of said conspiracy petitioner has been defrauded by the bankrupt of the entire amount here in issue.

VI.

Said order was and is erroneous in that, without the consent of all the parties to these proceedings, and particularly without the consent of petitioner or of the United States, and not having in the possession of the Court any property or fund with regard to which such determination was made, the Referee improperly attempted to exercise a summary jurisdiction in determination of amounts allegedly owing from petitioner to the bankrupt, which can properly be determined only in a plenary judicial proceeding.

Wherefore, the Court erred in issuing such order. Your petitioner, feeling aggrieved because of such order, respectfully prays that the same be reviewed.

CONSOLIDATED LIQUIDATING CORPORATION,

By /s/ JOHN M. ROBINSON,
Its Vice President,
Petitioner.

WRIGHT & GARRETT,

By /s/ JOHN F. McKENNA, Jr.,
Attorneys for Petitioner.

[Endorsed]: Filed May 2, 1949.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER

To the Hon. Hugh L. Dickson, Referee in Bankruptcy:

Your petitioner, United States of America, reserving all objections heretofore made with respect to the jurisdiction of this Court, respectfully shows:

I.

That on April 12, 1949, an Order, a copy of which is annexed hereto, was rendered pursuant to a petition for an order to show cause filed on or about March 29, 1948, and an order to show cause issued by this Court on or about March 31, 1948, upon said petition; that said petition and order named and were served only upon the Consolidated Steel Corporation; that a hearing was held thereon on April 22, 1948, at which the Consolidated Liquidating Corporation (formerly known as Consolidated Steel Corporation) appeared through their counsel; that the United States of America having a direct and substantial interest therein, filed a petition for leave to intervene in said proceedings,

which petition was granted; that the United States of America filed objections to the said proposed order to show cause, objecting, among other things, to the jurisdiction of this court; that said order of April 12, 1949, ordered Consolidated Liquidating Corporation to pay forthwith to George T. Goggin, as Trustee in the within bankruptcy proceeding, the sum of $26,484.29.

II.

That said order of April 12, 1949, was and is erroneous in that it is in substance and in fact the culmination of an unconsented suit against the United States; no statute vests jurisdiction over cases against the United States in courts of bankruptcy;

III.

That said order was and is erroneous in that there was nothing in the pleadings, evidence, stipulations, arguments or record, before the Referee sufficient upon which to base a finding, that neither Consolidated Liquidating Corporation nor the United States of America has any substantial bona fide adverse claim in and to the said monies.

IV.

That said order was and is erroneous in that the United States of America has a substantial bona fide adverse claim to the monies in question, which funds are not in the possession of the bankruptcy court, and hence, the summary relief sought by the Trustee herein and granted by the order of

April 12, 1949, was and is beyond the jurisdiction of the bankruptcy court.

V.

That said order was and is erroneous in that the amount thus ordered to be paid to the Trustee in Bankruptcy is not a fund which is the property of Consolidated Liquidating Corporation, but is a part of the amount which is not to be paid by said corporation pursuant to orders of the United States Maritime Commission, dated June 12, 1946, and the General Accounting Office of the United States, dated May 19, 1947, validly issued under and in accordance with the provisions of Public Law 319, 79th Congress, Chapter 80, 2nd Session (41 U.S.C., 51), commonly referred to as the Anti-Kickback Act; that said Act is a statute duly enacted by Congress and approved by the President of the United States on March 8, 1946; that said Act is within the powers and authority delegated to the Congress of the United States under the Constitution of the United States; that said order of the United States Maritime Commission was issued prior to the institution of the within bankruptcy proceedings; that said orders of the United States Maritime Commission and the General Accounting Office have not been withdrawn, rescinded, terminated or amended in any manner.

VI.

That said order was and is erroneous in that there was nothing in the pleadings, evidence, stipulations, arguments or record, before the Referee

sufficient upon which to base a finding that Consolidated Liquidating Corporation holds or has ever held the sum of $26,484.29, or any other sum on behalf of George T. Goggin, as Trustee of Brisbane & Company, bankrupt herein.

VII.

That said order was and is erroneous in that $6093.47 of the amount said order directs Consolidated Liquidating Corporation to pay to the said Trustee in Bankruptcy is not a liquidated amount owing by Consolidated Liquidating Corporation to the bankrupt, but as said order of April 12, 1949, shows on its face, is merely a tentative balance arising from certain purchase orders and is subject to the possible requirement of the United States Maritime Commission of further processing to determine the precise balance, if any; the determination of such balance is within the jurisdiction of the United States Maritime Commission, and is not within the jurisdiction of this bankruptcy court; that the order made is therefore in conflict with the findings of fact upon which it is stated to be based.

Wherefore, the Court erred in issuing such order. Your petitioner, United States of America, feeling aggrieved because of such order, respectfully prays that the same be reviewed.

JAMES M. CARTER,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division.

TOBIAS G. KLINGER,
Assistant U. S. Attorney.

/s/ TOBIAS G. KLINGER,
Assistant U. S. Attorney, Attorneys for the United States of America.

In the United States District Court, Southern District of California, Central Division

In Bankruptcy No. 44,467-B

In the matter of

BRISBANE & COMPANY, et al.,
Bankrupt.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING TRUSTEE'S PETITION AGAINST CONSOLIDATED LIQUIDATING CORPORATION (FORMERLY CONSOLIDATED STEEL CORPORATION)

George T. Goggin, as trustee in bankruptcy, heretofore filed a verfied petition for an order to show cause re Consolidated Steel Corporation, said petition being dated on or about March 29, 1948; thereafter and on or about March 31, 1948, the Honorable Hugh L. Dickson, as Referee in Bankruptcy, issued an order to show cause upon said petition

which was duly served upon the Consolidated Steel Corporation and a hearing was held thereon on the 22nd day of April, 1948, Wright & Garrett, Attorneys at Law, by Walter L. M. Lorimer, appearing as attorneys for Consolidated Liquidating Corporation (formerly known as Consolidated Steel Corporation), and Martin Gendel of counsel appearing as attorney for George T. Goggin as Trustee. At the same time the United States of America filed a petition for leave to intervene in said proceedings and said petition was granted and the United States allowed to appear as intervener, being represented by James M. Carter as United States Attorney, by Tobias G. Klinger of counsel; after the taking of testimony and the hearing of argument, the matter was duly submitted and the parties thereto thereafter entered into a written stipulation dated March 22, 1949.

Now, Therefore, based upon the aforesaid petitions, order to show cause, evidence, stipulations and argument, the undersigned Referee hereby makes the following findings of fact, conclusions of law, and order:

Findings of Fact

I.

That prior to the commencement of the within bankruptcy proceeding, Brisbane & Co., a partnership, bankrupt herein, entered into written purchase orders with the Consolidated Liquidating Corporation on No. H-402 and No. H-135.

II.

That subject to the possible requirement of the United States Maritime Commission of further processing, Consolidated Liquidating Corporation is obligated to pay the Trustee in Bankruptcy the sum of $1370.72 on purchase order No. H-402, and the sum of $4,722.75 on purchase order No. H-135.

III.

That the Consolidated Liquidating Corporation is indebted to Brisbane & Co. on an open book account in the sum of $20,390.82.

IV.

That in connection with the creation of the indebtedness from Consolidated Liquidating Corporation to the bankrupt herein, Consolidated Liquidating Corporation was a prime contractor on contracts with the United States Maritime Commission, and the bankrupt herein was a subcontractor.

V.

That on June 12, 1946, the United States Maritime Commission, and on May 19, 1947, the General Accounting Office, pursuant to the provisions of Title 41, U.S.C., Sec. 51, directed Consolidated Steel Corporation to withhold payment of said monies to Brisbane & Company.

VI.

That neither the United States of America nor the Consolidated Liquidating Corporation has any substantial bona fide adverse claim in and to the

said moneys, and the said moneys are being held by Consolidated Liquidating Corporation on behalf of George T. Goggin as Trustee of Brisbane & Company, bankrupt herein.

Conclusions of Law

From the above findings of fact, the undersigned Referee does hereby make the following conclusions of law:

I.

That Consolidated Liquidating Corporation is obligated to forthwith pay to George T. Goggin, as trustee in the within bankruptcy estate, the sum of $26,484.29.

II.

That neither Consolidated Liquidating Corporation nor the United States of America has any claim in and to said moneys.

Order

From the foregoing findings of fact and conclusions of law,

It Is Hereby Ordered that Consolidated Liquidating Corporation forthwith pay to George T. Goggin, as Trustee in the within bankruptcy proceeding, the sum of $26,484.29.

Dated: April 12th, 1949.

HUGH L. DICKSON,
Referee in Bankruptcy.

Approved as to Form:

JAMES M. CARTER,
United States Attorney.

By /s/ TOBIAS G. KLINGER,
Special Assistant to the United States Attorney,
Attorneys for the United States of America.

WRIGHT & GARRETT,

By /s/ WALTER L. M. LORIMER,
Attorneys for Consolidated Liquidating Corporation (formerly known as Consolidated Steel Corporation).

[Endorsed]: Filed May 2, 1949.

(Title of District Court and Cause.)

CERTIFICATE OF REFEREE ON REVIEW RE APRIL 12, 1949, ORDER

To the Honorable Campbell E. Beaumont, Judge of the United States District Court, for the Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy, to whom the above-entitled matter has been referred, Do Hereby Certify as follows:

That the controversy presented by this review arose in the following manner:

1. That in the within bankruptcy proceedings, the Trustee in Bankruptcy filed a petition for order to show cause why the Consolidated Steel Corpora-

tion, now known as the Consolidated Liquidating Corporation, and hereinafter referred to as "Consolidated," should not be required to turn over to the Trustee herein certain moneys properly owing to the bankrupt estate by Consolidated. The nature of this controversy will hereinafter be more fully set forth.

2. This Referee issued an order requiring Consolidated to show cause, in accordance with the prayer of the Trustee's petition. Subsequently, petition was filed on behalf of the United States of America for leave to intervene and said petition was granted.

3. The said order to show cause regularly came on for hearing and this Referee made findings of fact and conclusions of law and an order to the effect that Consolidated should forthwith pay to the Trustee in the within bankruptcy proceedings, the sum of $26,484.29.

4. Both the United States of America and Consolidated have filed petitions for review of this order.

The principal question presented by this review is whether this Referee, under all the facts as hereinafter set forth, properly ordered Consolidated to pay to the Trustee herein, said sum of $26,484.29.

That prior to the commencement of the within bankruptcy proceedings, it appears that Brisbane & Company, a partnership, one of the bankrupts herein, was carrying on business with Consolidated; that a part of said business consisted of the per-

formance of services by said bankrupt as a subcontractor on contracts with Consolidated, wherein Consolidated was a prime contractor with the United States Maritime Commission; that prior to the commencement of the within bankruptcy proceedings, which occurred on or about the 8th day of July, 1946, the United States of America had instituted an investigation of alleged war frauds by Eugene C. Brisbane, personally, one of the bankrupts herein, in conspiracy with other persons; Brisbane & Company, as distinguished from Eugene C. Brisbane, is a limited partnership entity, which was also adjudicated a bankrupt in the within proceedings. Pursuant to an order of this Court duly made after notice to all persons involved in the within proceedings, and on or about the 22nd day of December, 1947, the Trustee in Bankruptcy was directed to segregate the assets of Eugene C. Brisbane as an individual, as against his individual liabilities, and the assets of Brisbane & Company, a limited partnership, as against its liabilities, and to administer the within estate on the basis that the assets of each entity should be first applied to the payment of obligations of the entity from which it originated, and only in the event of a surplus, which does not now appear to be probable, would the assets of one entity be used to pay the obligations of the other entity involved in the within proceedings.

The Trustee herein attempted to collect moneys owing to the within estate from Consolidated to Brisbane & Company, the limited partnership, covering the following items:

A. An undisputed account payable owing on a book account in the amount of $20,390.82, and

B. Such amounts as might be owing to the within estate as the result of termination claims filed by Brisbane & Company with Consolidated prior to the commencement of bankruptcy,

which claims passed as a matter of law to the Trustee herein.

The termination claims (described in "B" above) arose from Purchase Orders Nos. H-402 and H-135, totalling gross claims in the sum of $47,229.34. It appeared by testimony and stipulation that, to date, subject to possible further processing, Consolidated and the United States Maritime Commission had agreed to recognize said termination claims to the extent of $1,370.72 on Purchase Order No. H-402, and $4,722.75 on Purchase Order No. H-135. It further appears from the record that Consolidated is ready, willing and able to pay the moneys described hereinabove to the within estate, save and except that Consolidated received a letter from the United States Maritime Commission dated June 12, 1946, and a letter from the General Accounting Office dated May 19, 1947, directing Consolidated to withhold payment of the moneys to Brisbane & Company. Said letters are purportedly predicated upon the alleged violation by Eugene C. Brisbane, personally, of the provisions of Public Law 319, enacted by the 79th Congress, Volume 54 of the United States Codes Annotated, page 97, and further described in Title 41, U.S.C. §51, commonly known as the "Anti-Kickback Act."

In determining the merits of this matter, the undersigned Referee finds that there was no bona fide objection to the jurisdiction of this Court by the United States of America, and that the United States of America specifically petitioned for leave to intervene in these proceedings by its petition dated April 22, 1948; that it joined issues with the Trustee in Bankruptcy on the merits of the petition and order to show cause as against Consolidated and participated generally in the conduct of the hearing on the Order to show cause against Consolidated, and by this course of conduct waived any objection to which it might have otherwise have been entitled or that it might have intended to assert against the jurisdiction of the Bankruptcy Court.

It does not appear to the undersigned Referee that the provisions of the Anti-Kickback Act have been sufficiently complied with by the United States of America to entitle the Bankruptcy Court to determine that the United States of America has any adverse claim to the moneys in question; it further appears that the statute itself does not provide any court or forum wherein creditors of the sub-contractor involved could present their claims in order to determine whether or not the Government was validly acting pursuant to the provisions of the Anti-Kickback Act, and other related questions. In other words, the statute itself does not appear to be sufficiently implemented to meet the constitutional provisions involving due process of law. On the other hand, it would appear that the Bankruptcy Court, in the absence of any specific

designation in the Anti-Kickback Act of any other specific forum, is a proper and adequate court to determine the rights of any parties where bankruptcy and creditors' interests intervene in the dealings between a prime contractor and a subcontractor.

A governing factual situation in the instant case is that the entity contracting with Consolidated was a limited partnership, whereas the acts complained of by the United States or America were directed against an individual; pursuant to the order of segregation hereinabove referred to, the withhold direction complaining of Brisbane's individual wrongful acts, under the Anti-Kickback Act, would not be effective as against moneys owing from Consolidated to the bankrupt partnership. The rights of innocent partnership creditors are admittedly not tainted with any war fraud activities and should not be jeopardized by any possible arbitrary action on the part of individual Government representatives reflected by the letters above referred to, as dated June 12, 1946, and May 19, 1947, without the right of such innocent persons to be heard in a court of proper jurisdiction, such as the within bankruptcy court. The party holding the moneys involved herein is Consolidated, and it makes no claim of ownership to the funds; the United States of America does not have possession of the moneys involved and its claims do not apear to be meritorious, bona fide or sufficiently adverse, under law, in the light of the admitted facts, so that it could be considered that the United States of America had

even constructive possession, adversely of the moneys in question.

This Referee fully recognizes the problem of possibly appearing to challenge the constitutionality of an enactment of Congress, but such a purported challenge does not appear to be necessary under the facts described above, although it would appear that the statute itself does not comply with the recognized requirements of due process of law as far as the rights of third parties are concerned. It therefore appears that both fairness, as well as good law, require the making of the order from which review is sought herein.

In compliance with provisions of Section 39(a)(8), I attach to this Certifiate the following:

1. Copy of the order of adjudication of Eugene Brisbane, dated August 15,, 1946. (By reference)

2. Copy of the order of adjudication of Brisbane & Company, a limited partnership, dated January 24, 1947. (By reference)

3. The petition of George T. Goggin, as trustee, for an order to show cause against Consolidated Steel Corporation, which petition is dated the 29th day of March, 1948.

4. The order to show cause against Consolidated Steel Corporation issued by this Court on the 31st day of March, 1948.

5. Petition on behalf of the United States for leave to intervene.

6. Objections of the United States to order to show cause, filed April 22, 1948.

7. Stipulation filed March 28, 1949.

8. Findings of Fact and Conclusions of Law and Order granting Trustee's petition, signed by the Referee in Bankruptcy on April 12, 1949.

9. Transcript of hearing on the order to show cause held April 22, 1948.

10. Copy of order of segregation dated December 22, 1947.

11. Application of United States of America for order extending time for review, and order thereon.

12. Application for extension of time within which to petition for review by Consolidated Liquidating Corporation, and order thereon.

13. Notice of change of name of Consolidated Steel Corporation to Consolidated Liquidating Corporation.

14. Petition for review of the Referee's order filed May 2, 1949, by the United States of America.

15. Petition for review of Referee's order filed May 2, 1949, by Consolidated Liquidating Corporation.

Dated: June 23, 1949.

Respectfully submitted,

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed June 30, 1949.

[Title of District Court and Cause.]

REFEREE'S SUPPLEMENTAL CERTIFICATE ON REVIEW RE APRIL 12, 1949, ORDER

To the Honorable Campbell E. Beaumont, Judge of the United States District Court, for the Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy, to whom the above-entitled matter has been referred, Do Hereby Certify supplementally herewith, and attach hereto, the following:

1. Transcript of hearing on the Order to Show Cause held April 22, 1948.

2. Memorandum of Points and Authorities of Consolidated Steel Corporation filed April 22, 1948.

Dated: July 14th, 1949.

Respectfully submitted,

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed July 14, 1949.

[Title of District Court and Cause.]

REFEREE'S SECOND SUPPLEMENTAL CERTIFICATE ON REVIEW RE APRIL 12, 1949, ORDER

To the Honorable Campbell E. Beaumont, Judge of the United States District Court, for the Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy, to whom the above-entitled matter has been referred, Do Hereby Certify supplementally herewith, and attach hereto, the following:

1. Photostatic copy of letter from United States Maritime Commission to Consolidated Steel Corporation dated June 12, 1946, (Trustee's Exhibit No. 1, filed April 22, 1948.)

2. Photostatic copy of Letter from General Accounting Office to Consolidated Steel Corporation dated May 19, 1947. (Trustee's Exhibit No. 2, filed April 22, 1948.)

Dated: July 17, 1949.

Respectfully submitted,

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

TRUSTEE'S EXHIBIT No. 1

United States Maritime Commission
Washington

Office of the Chairman

June 12, 1946.

Consolidated Steel Corporation
Box 6880
East Los Angeles Branch
Los Angeles, California

Gentlemen:

Further reference is made to your letter of April 19, 1946, advising the Maritime Commission of the claim in the amount of $21,857.04 being asserted against Consolidated Steel Corporation by the assignee of Brisbane & Company, one of the subcontractors under your contract with the Commission.

Upon receipt of your letter, this office requested the views of the Department of Justice with respect thereto, and in reply was advised by letter dated June 5, 1946, that the Federal Bureau of Investigation reports establish that Eugene Charles Brisbane, owner of Brisbane & Company, had paid more than $50,000 to one of the employees of your Company in violation of Public Law 319—79th Congress.

Pursuant to the specific provisions of said statute, you are directed to withhold, in behalf of the Government, the entire amount of the claim in question until further notice. Should any legal proceedings

be instituted by said claimant, it is requested that you advise this office thereof immediately.

Sincerely yours,

/s/ W. W. SMITH,
Chairman.

Filed April 22, 1948.

TRUSTEE'S EXHIBIT No. 2

General Accounting Office

Audit Division

Room 603, 3636 Beverly Blvd.
Los Angeles 4, California.
May 19, 1947.

Consolidated Steel Corporation
P. O. Box 6880, East Los Angeles Branch
Los Angeles, California

Gentlemen:

Reference is made to the sentencing on October 28, 1946, of Robert William McBurney, former purchasing agent for Consolidated Steel Corporation, Shipbuilding Division, Wilmington, California, following his conviction on September 20, 1946, on charges brought by the United States in the District Court of the United States for the Southern District of California, Central Division, in Criminal No. 18252, under Title 18, United States Code, Section 88, of conspiracy with Eugene Charles Brisbane and others to defraud the United States through collusive bidding on purchase orders, the cost of which was reimbursed by the Gov-

ernment under cost-reimbursable contracts MCc-1520, MCc-1790, MCc-1791, MCc-1792, MCc-2235, MCc-7713, MCc-7714, MCc-8524, MCc-15951, MCc-26055 and DA-MCc-857 between your corporation and the United States Maritime Commission.

It was disclosed through testimony in open court by both Brisbane and McBurney that the latter received through Brisbane a total of between $60,000 and $67,000 in kickbacks from the following subcontractors of Consolidated Steel Corporation named in the indictment:

Defendant	Company
Eugene Charles Brisbane	Brisbane & Company
Anson Browne	B & L Machine Tool & Die
Bruce P. Stone, Lawrence L. Stone	Wire & Metal Manufacturing Company
Robert N. Simpson, Arthur F. Simpson, Jr.	Simpson Steel Company; Commercial Piping & Engineering Co.
Roland H. Wilcox	Wilmington Welding & Boiler Works

It is further shown, in the income tax returns of both Brisbane and McBurney, that the following subcontractors paid a total of $128,499.38 to Brisbane of which McBurney received $65,308.65.

B & L Machine Tool & Die	$ 44,930.79
Davenport Manufacturing Co.	31,795.66
Commercial Piping & Engineering Co.	5,339.00
Wire & Metal Manufacturing Co.	46,433.93
Total	$128,499.38

In this connection, it is reported by Mr. F. J. Knoeppel, vice president of your corporation in letter dated November 19,. 1946 to the United States Maritime Commission that there had been withheld from subcontractors named in the above indictment the sum of $22,694.36, as follows:

Brisbane & Company	$20,390.82
Simpson Steel Company	353.69
Wilmington Welding & Boiler Works	114.81
Wire & Metal Manufacturing Company	1,835.04
	$22,694.36

Accordingly, in view of the Anti-Kickback Act of March 8, 1946, 60 Stat. 37, providing that the amount of such kickbacks shall be recoverable on behalf of the United States by set-off of moneys otherwise owing to the subcontractor by a prime contractor, payment of the sum of $22,694.36,. or of any additional amounts owing to the above-listed vendors, should continue to be withheld pending further instructions.

/s/ C. M. BAILEY,
Zone Senior Chief Cost Auditor.

Filed April 22, 1948.

[Endorsed]: Filed July 19, 1949.

In the United States District Court, Southern District of California, Central Division

In Bankruptcy No. 44,467-B

In the Matter of

EUGENE C. BRISBANE, Individually, and BRISBANE & COMPANY, a limited partnership, etc.,

Bankrupts.

ORDER RE MOTION TO SUSPEND ENFORCEMENT OF REFEREE'S ORDER

This cause came on regularly to be heard before the above entitled Court at 10 a.m. on December 19, 1949, upon the motion of petitioner on review, Consolidated Liquidating Corporation, and upon the affidavit in support thereof. Said motion was argued by Walter L. M. Lorimer of Wright & Garrett, attorneys for petitioner, and by Bernard Shapiro for Martin Gendel of counsel for George T. Goggin, Trustee in Bankruptcy of the within bankrupt estate, and after hearing said counsel for the respective parties, the motion was duly submitted to the Court for decision.

This Court finds that the rights of all parties in interest will be protected by the suspension of the order of the Referee herein dated April 12, 1949, directing petitioner, Consolidated Liquidating Corporation, to pay to the Trustee in Bankruptcy herein, George T. Goggin, the sum of $26,484.29, upon the condition that said petitioner, Consoli-

dated Liquiding Corporation, shall forthwith deliver to the Clerk of this court the sum of $26,484.29 in cash, or in the form of a proper and sufficient surety bond, or in the form of a cashier's check or of a certified check.

It Is Hereby Ordered, Adjudged and Decreed that petitioner, Consolidated Liquidating Corporation's Motion To Suspend Enforcement of Referee's Order be, and it hereby is granted upon the condition that said petitioner forthwith deliver to the Clerk of this court the sum of $26,484.29 in cash, or in the form of a proper and sufficient surety bond, or in the form of a cashier's check or of a certified check.

Dated: This 22nd day of December, 1949.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to form:

WRIGHT & GARRETT,

By /s/ WALTER L. M. LORIMER,
Attorneys for Petitioner on Review, Consolidated Liquidating Corporation.

Judgment entered Dec. 27, 1949.

[Endorsed]: Filed December 22, 1949.

In the United States District Court, Southern District of California, Central Division

In Bankruptcy No. 44,467-B

In the Matter of

BRISBANE & COMPANY, a limited partnership, Bankrupt,

EUGENE C. BRISBANE, individually, Bankrupt.

ORDER ON REVIEW OF REFEREE'S ORDER DATED APRIL 12, 1949, DIRECTING CONSOLIDATED LIQUIDATING CORPORATION TO PAY TO TRUSTEE $26,484.29

Cline v. Kaplan, 323 U. S. 97 (1944) appears to me to be controlling here. The respondent in that case had actual possession of the property involved in the summary turnover order, and was, itself, making an adverse claim. But the turning point of the decision did not depend upon those two things. It turned upon the question as to whether or not consent had been given to the summary proceeding and whether or not the adverse claim was bona fide and not merely colorable or frivolous.

Admittedly, the Bankruptcy Court in this instance does not have actual possession of the money. It cannot have constructive possession if the claim is unliquidated. A claim is unliquidated if the one having actual possession contests it. Barkschat v. Chichester (CCA9) 102 Fed. (2) 975; In re Eakin (CCA2) 154 Fed. (2) 717, 719. Moreover, the find-

ings of the Referee are barren of any finding as to actual or constructive possession; they merely find that Consolidated is indebted to the Bankrupt in the specified sum.

Under the provisions of the Anti-Kickback Act of March 6, 1946 (41 USCA 51) the U. S. Maritime Commission notified Consolidated to withhold any moneys claimed to be due to Brisbane & Company. This notice was sent on June 12th, 1946, almost one month prior to the filing of the petition under Chapter XI in the within matter. Adjudication as a bankrupt did not occur until August 15th, 1946. Whatever the status of the Bankrupt's claim against Consolidated prior to June 12th, 1946, it thereupon became an unliquidated claim, as Consolidated was then in a position of possibly being obligated to the United States instead of to the Bankrupt. This position arose by operation of law, viz., the Anti-Kickback Act, and not through any voluntary act of Consolidated. The claim of Consolidated was therefore "adverse," in that it did not owe the bankrupt the claimed money, if the United States were entitled to it. Moreover, it cannot be said that the claim against Consolidated was liquidated, in view of the provisions of the Termination of War Contracts Act (41 USCA 101) under which final approval of the Maritime Commission of the amounts due Brisbane would have to be had before such claim could be considered as liquidated. And such claim of Consolidated being based upon statutes of the United States, under which the United States were making a claim upon Consolidated, was a bona

fide claim, and not spurious, colorable, or frivolous so far as Consolidated is concerned.

The claim of the United States to the money, being made under the provision of the same Statutes, and other applicable laws, is likewise bona fide and not spurious, colorable or frivolous.

In view of the foregoing, both Consolidated and the United States are entitled to have their rights adjudicated in suits of ordinary character with the rights and remedies incident thereto, unless they have both consented to the summary jurisdiction of the Referee. The United States saved consent by timely objection. The record is not here which shows Consolidated's response, but it is indicated in the briefs that Consolidated also objected to the jurisdiction and did not consent. But whether the latter is true or not, the United States, being the adverse claimant to the ultimate right to the money, and having made such objection, removes the whole matter from the summary jurisdiction of the Bankruptcy Court.

The order of the Referee is reversed.

Los Angeles, California, May 25th, 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

Judgment entered May 26, 1950.

[Endorsed]: Filed May 25, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the Above-Entitled Court:

Notice Is Hereby Given that George T. Goggin, as Trustee of the above-named bankrupt estate, hereby appeals to the United States Court of Appeals for the 9th Circuit from the Order On Review of Referee's Order Dated April 12, 1949, Directing Consolidated Liquidating Corporation to Pay to Trustee $26,484.29 entered in this Court on May 25, 1950, Judgment Book No. 66, Page 96, and from the holding thereof.

Dated: This 13th day of June, 1950.

/s/ MARTIN GENDEL,
Of Counsel for George T. Goggin, Trustee and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 14, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

To: The Clerk of the Above-Entitled Court:

George T. Goggin, Trustee of the above-named bankrupt estate, through his counsel, hereby designates the entire record before the District Court,

including all papers, pleadings and evidence certified to the District Court by the Honorable Hugh L. Dickson, Referee in Bankruptcy, with his Certificate on Review, and his two supplemental Certificates on Review, from his Order of April 12, 1949, directing Consolidated Liquidating Corporation to pay to the Trustee $26,484.29.

Pursuant to the provisions of 75(o) of the Rules of Civil Procedure for the United States District Court, and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the 9th Circuit, as amended, request is hereby made that the Clerk of the above-entitled Court transmit all of the original papers in the file dealing with the action or the proceeding in which the appeal has been taken, including the Notice of Appeal and this designation.

Dated: This 13th day of June, 1950.

/s/ MARTIN GENDEL,

Of Counsel for Appellant, George T. Goggin, Trustee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 16, 1950.

In the District Court of the United States, Southern District of California, Central Division

No. 44,467-B

In the Matter of

EUGENE C. BRISBANE, dba BRISBANE & CO., Bankrupt.

HEARING ON ORDER TO SHOW CAUSE ON CONSOLIDATED STEEL CORPORATION

The following is a stenographic transcript of the proceedings in the above-entitled cause, which came on for hearing before the Honorable Hugh L. Dickson, United States Referee in Bankruptcy, at his courtroom, 343 Federal Building, Los Angeles, California, at the hour of 10:00 a.m., April 22, 1948.

Appearances:

MARTIN GENDEL, ESQ.,

Appearing on behalf of the Trustee, George T. Goggin.

T. G. KLINGER,

Special Assistant U. S. Attorney for United States of America.

WRIGHT AND GARRETT, By

WALTER L. M. LORIMER, ESQ.,

Appearing on behalf of Consolidated Steel Corporation.

The Referee: We now have the matter of Brisbane.

Mr. Gendel: That is ready, your Honor.

Mr. Klinger: Your Honor, on behalf of the United States, I present to the Court a petition for leave on behalf of the United States to intervene in this present proceeding before your Honor.

The Referee: May I see the petition? On what is it based?

Mr. Klinger: We have a direct and substantial interest in the outcome of the proceedings, and in the payment of the moneys, if such payment is ordered, because as the petition states, any sums which Consolidated Steel will be required to pay, will constitute items of claimed reimbursement from the United States under the prime contract.

The Referee: All right, sir, I don't see any reason why you shouldn't intervene.

Mr. Klinger: Thank you, your Honor. I don't think there is any objection. In fact, I believe that the proceedings to this point have contemplated such an intervention.

The Referee: Let's proceed.

Mr. Lorimer: Your Honor, I have prepared a memorandum of points and authorities which we are going to argue at this hearing.

Mr. Gendel: I think it might be well, Mr. Lorimer, to reserve that memorandum because you should first take our evidence. We don't know whether your memorandum is going to come in it because it contains statements of facts and we may have a method of setting up machinery to possibly

take care of the termination claims Mr. Klinger and I discussed. We might take all the testimony that Mr. Crawford can present this morning and we might have to continue it for that other phase. I think we should have our evidence in before we burden the Court with any memorandum of points and authorities.

The Referee: I would much prefer to know what the testimony is before I guess at what the law is applicable in this case here, where there seems to be a conjecture. Let's hear the evidence.

Mr. Gendel: Perhaps we might introduce it through Mr. Crawford.

ROBERT M. CRAWFORD

called as a witness on behalf of the Trustee, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gendel:

Q. What is your true name?

A. Robert M. Crawford.

Q. And by whom are you employed, Mr. Crawford? A. Consolidated Steel Corporation.

Q. What is your capacity?

A. I am manager of the Accounting Department of the Shipbuilding Division.

Q. You have heretofore testified in this case, have you not? A. I have, yes.

Q. Around June 7, 1947, is that right?

A. I imagine that is possibly about the right date; I don't remember exactly.

(Testimony of Robert M. Crawford.)

Q. All right. Now, Mr. Crawford, you have under your direction and control the ledger sheets and the accounting figures of Consolidated Steel Corporation, Shipbuilding Division, isn't that right?

A. That is right.

Q. And your company has an account with Brisbane and Company, isn't that correct?

A. Yes, sir, that is correct.

Q. And that account is broken up into several phases, isn't that correct, one is an open book account? A. That is right.

Q. And the other are two termination contract claims, isn't that correct? A. That is correct.

Q. And isn't it true that as far as the open book account is concerned, after you have taken credit for such offsets that you have heretofore urged against Brisbane and Company, that as far as the records are concerned, Consolidated Steel Corporation, the Shipbuilding Division thereof owes Brisbane and Company $20,390.82?

A. That is correct.

The Referee: Is that on the open account?

The Witness: That is on the open book account, $20,390.82.

Mr. Gendel: That is the amount, your Honor, set forth in Paragraph 2 of the Petition for the Order to Show Cause.

The Referee: I see.

Q. (By Mr. Gendel): Now, I referred to contract termination claims and those are under two

(Testimony of Robert M. Crawford.)

purchase orders, are they not, purchase Order No. H-402—— A. That is right.

Q. ——upon which the Bankrupt entity, Brisbane and Company, had claimed $2,212.31, and the other is purchase Order No. H-135, isn't that correct—— A. That is right.

Q. ——upon which Brisbane and Company have claimed $47,229.44, is that correct?

A. Yes, those amounts are correct.

Q. Those are their claims, anyway?

A. That is right.

Q. Now, your office and representatives of the United States Maritime Commission have audited those termination claims, have they not?

A. Yes, sir, that is right.

Q. And as far as your audits have gone for the record, is it true that on purchase Order No. H-402, on which Brisbane and Company claim $2,212.31, that amount has been audited for approval in the sum of $1,112.44? A. That is right.

Q. And is it true that on purchase Order No. H-135, on which Brisbane and Company claim $47,-229.44, that it has been audited in the amount of $10,534.05? A. That is correct, also.

Q. So that the total amounts audited for approval to date on the termination claims by Consolidated Steel Corporation and the United States Maritime Commission, are $11,646.49, is that correct?

A. That is correct, yes, sir.

Q. All right. Now, demand has been made upon Consolidated Steel Corporation for the payment of

(Testimony of Robert M. Crawford.)

the $20,390.82, through the Trustee in bankruptcy, of Brisbane and Company, has it not?

A. Yes.

Q. And has that amount been paid?

A. It has not.

Q. Now, demand has been made upon Consolidated Steel Corporation by Mr. Goggin, as Trustee of Brisbane and Company, for the termination payments, isn't that correct? A. Yes.

Q. And has that amount been paid?

A. It has not been paid.

Mr. Gendel: Now, although actually, Your Honor, I presume the moving party could stop us as of this point, I think Your Honor should get the whole picture from this witness so far as he knows. I take the burden of going ahead with this, anyway.

Q. Mr. Crawford, your company has received certain written communications from the United States of America in connection with the payment of these claims, has it not?

A. That is correct, yes, sir.

Q. And will you take from your file those communications which you have received from the Government concerning the claims?

(Witness showing two documents to counsel.)

Q. (By Mr. Gendel): Now, you have handed to me two letters bound together, one purporting to be on the stationery of General Accounting Office, Audit Division, bearing date of May 19, 1947, di-

(Testimony of Robert M. Crawford.)

rected to Consolidated Steel Corporation, and the other purporting to be on the stationery of the United States Maritime Commission, Washington, directed to Consolidated Steel Corporation, bearing date of June 12, 1946. To your knowledge, did your company, Consolidated Steel Corporation, receive these two communications?

A. Yes, we did, and these are not all. There is some prior to this.

Q. Well, you have received other similar letters?

A. Yes, the first notice we received, I believe, was in October of 1945, from the Maritime Commission.

Mr. Gendel: Do you have such a letter, Mr. Lorimer?

Mr. Lorimer: I don't think I have it here, but that was before the Anti-Kickback Act.

Mr. Gendel: That didn't have anything to do with the whole proceedings, Mr. Lorimer.

Mr. Lorimer: No.

Q. (By Mr. Gendel): Subsequent to March, 1946, when the Anti-Kickback Act was enacted by Congress, the only communications you received from the United States, with reference thereto, were the two letters that we have identified, the letter of June, 1946, and the letter of May, 1947?

A. That is correct.

Mr. Gendel: They are rather lengthy, Your Honor. I think perhaps they should be introduced

(Testimony of Robert M. Crawford.)

in evidence and Your Honor should have a chance to read them.

The Referee: Any objection, Mr. Crawford?

The Witness: No objection.

The Referee: For any reason he should want them back, you can substitute a photostatic copy of them into the record.

Mr. Gendel: We will be glad to cooperate.

The Witness: We may need them for our records eventually.

The Referee: We will have them photostated and sent back to you.

Mr. Lorimer: Fine. Send them back to the Wright and Garrett offices, who are the attorneys for Consolidated Steel Corporation.

Mr. Gendel: Then this will be Trustee's Petition No. 1.

Mr. Lorimer: To save you the trouble of photostating them, I already have them here.

Mr. Gendel: All right. Why don't we introduce them then. Perhaps for the clarification of the record, let's introduce these photostats separately because they might be of separate information. We ask that the first photostats to be introduced be that of the United States Martime Commission, dated June 12, 1946, to the Consolidated Steel Corporation.

The Referee: All right, that will be Trustee's No. 1.

Mr. Gendel: And as Trustee's No. 2, Your Honor, we ask the introduction of the communication from

(Testimony of Robert M. Crawford.)

the General Accounting Office, dated May 19, 1947, to the Consolidated Steel Corporation.

Mr. Lorimer: No objections.

Mr. Klinger: No objections.

The Referee: It will be received in evidence as Trustee's Exhibit No. 2.

(The documents were received in evidence as Trustee's Exhibits Nos. 1 and 2, respectively.)

Q. (By Mr. Gendel): The gist of those two communications, Mr. Crawford, is that the Government is interested in the Anti-Kickback Act violations and therefore instructs Consolidated Steel Corporation not to pay the money, is that correct?

A. Yes, that is correct. That is what it is all about.

Q. And as far as you know, those two letters and what is contained in the letters, are the reasons that Consolidated Steel Corporation have not paid the money, is that correct?

A. That is right.

Q. As far as the open book account is concerned, as I understand, there is no question at all concerning the mathematics of that. If the money is to be paid, that is the correct amount?

A. That is correct. There is no argument about that.

Q. Now, as far as the termination claims are concerned, there is an argument about the total amounts claimed by Brisbane and Company, but that as far as Consolidated Steel Corporation is

(Testimony of Robert M. Crawford.)

concerned, and the prime audit made by the United States Maritime Commission's representative, those two termination claims are subject to approval in the sum of $11,646.49, is that correct?

A. That is correct.

Mr. Gendel: That is all, Mr. Crawford.

Cross-Examination

By Mr. Lorimer:

Q. First, as to the termination claims. Mr. Crawford, you stated that as far as Consolidated Steel Corporation is concerned, the audit of $11,-646.49 is correct. As far as the Maritime Commission is concerned, is it necessarily a correct figure?

A. Not necessarily so. I might perhaps explain that just a trifle.

The Referee: All right.

The Witness: When the sub-contractor submits his claim for costs on a terminated portion of the contract, generally he tries to include in there everything that he thinks he can get away with.

The Referee: You mean that applies to all contractors?

The Witness: That applies to pretty nearly all of them that we found.

The Referee: Well, then, honesty is missing among contractors.

The Witness: It seems to be. It has always been our procedure then to audit the contractors' books and to determine just what portion of material or

(Testimony of Robert M. Crawford.)

labor and overhead and so forth has been consumed upon the portion of the terminated contract, which he has completed as of the date of the termination. Under the contract termination Act certain specific overhead allowances and profit allowances and interest allowances and things of that sort are provided for. So, in making an analysis of the contractors' settlement claims which he submits, our auditors will go through and make a complete audit and determine what in their opinion is a proper amount to be reimbursed to that sub-contractor for his termination claim.

The Referee: Let me ask you right now. Were these contracts on a cost plus basis?

The Witness: No, they were fixed amounts, definite amounts.

After we have determined what we think is a reasonable and fair amount to offer the contractor as a settlement claim, all we can do with that is to submit it to the contract termination settlement section of the Maritime Commission with our recommendation that that probably is correct. Now, the settlement section of the Maritime Commission, they may take some further exceptions to it for various reasons, real or imaginary, and they may take some various exceptions.

Q. (By Mr. Gendel): At that point, isn't it true in this particular case, that Mr. O'Neill came here from the United States Maritime Commission at Washington or back East, from the head office, and that your office and Mr. O'Neill and the local

(Testimony of Robert M. Crawford.)

representatives of the United States Maritime Commission did complete your audit, as far as the audit itself is concerned?

A. I think that is probably correct, although I wouldn't be too sure about that, because at that time all of these matters were handled by a contract termination decision of the Consolidated Steel Corporation of which I was not a part, and I wasn't in on any of that detail work or negotiations there. So I am not sure whether Mr. O'Neill agreed to these figures or not. However, even though Mr. O'Neill might have, when it gets to a contract settlement section in Washington, they might still overrule Mr. O'Neill.

Q. In other words, if the Government has permitted this matter to go through in the ordinary course of termination procedure, the figures that Brisbane and Company had submitted and the figures that your company and the local auditor of the United States Maritime Commission, would all be submitted to the home office and they would process those figures and either approve them or maybe raise them or lower them?

A. That is right.

Q. But that hasn't been completed because of these two letters?

A. That has not been done as yet.

Mr. Lorimer: I don't know whether it is because of the two letters.

Mr. Gendel: Apparently so.

The Witness: I don't know the reason why it

(Testimony of Robert M. Crawford.)

has not been done, but the contract settlement division of the Maritime Commission have not given us any approval on the termination claims.

Mr. Gendel: Well, I might state for the record, Your Honor, that I believe Mr. Klinger is familiar with the letter which we received from the contract termination division saying that they could not complete the processing of these termination claims because of the contents of the communications, Trustee's Exhibits 1 and 2, and that is a hold order by the Department of Justice, and until that hold order was removed, they wouldn't complete their processing.

Mr. Klinger: I don't remember.

Mr. Gendel: I think I gave you a copy of that letter, Mr. Klinger.

Mr. Klinger: I don't know. That is one of the things that we are going to check on.

Mr. Gendel: I might state that that is the phase we discussed as being possibly subject to an ascertainment by correspondence so that the home office could complete its analysis and if we can reach a mutually agreeable figure, that would eliminate any question of mathematics and facts entirely; we would have then the question of law before you, Your Honor.

Q. (By Mr. Lorimer): Mr. Crawford, to your knowledge, has the Maritime Commission ever approved a claim in a lower amount than the amount set aside by Consolidated Steel to the Maritime Commission? A. Yes, they have.

(Testimony of Robert M. Crawford.)

Q. Even after Consolidated Steel has audited the claim of the other?

A. All Consolidated Steel could do would be to make an audit and determine what we thought was reasonable and submit that to the contract settlement section for their approval. The contract settlement section sometimes applies various regulations that are contained in the contract termination Act, in a different manner than we might interpret them, and they might cut something down and they might cut some overhead allowances down or they might cut a profit down or they might eliminate interest or any number of things where they might either increase or decrease the amount of the claim, generally decreasing it, however.

Q. What you just said doesn't apply to either of these termination claims involved here, but it could conceivably?

A. So far as Consolidated Steel is concerned, we have no knowledge of what the contract termination settlement might do with these claims. We have never been apprised on that.

Q. Going back to both the open book account and the termination claim, you stated earlier in your testimony that as far as Consolidated Steel Company records are concerned, the open book account shows that Consolidated owed Brisbane $20,390.82, and that Consolidated audit for the purchase orders was $11,646.49. That is as far as the records are concerned. Would Consolidated have any other defense against the payment of this money to Bris-

(Testimony of Robert M. Crawford.)

bane other than what shows on the records. In other words, apart from the Kickback Order of the United States, would there be a conceivable defense of fraud? A. Well——

Mr. Gendel: That is asking a witness for a conclusion of law.

The Witness: I am an accountant and not an attorney.

The Referee: He says he is not an attorney, so he cannot answer it as he is not a lawyer.

Mr. Klinger: May I clarify the record on that one point. Then it is not your testimony, is it, that the only reason the money has not been paid is the withholding order? You don't know if that is the only reason or whether there are additional reasons why this money has not been paid to Brisbane and Company?

The Witness: I only know that, as an employee, you might say, of Consolidated Steel, who would draw a check to Brisbane, I would say that in this particular instance I would not draw such a check in the face of these withhold orders. Whether there would be any other reason why they shouldn't be drawn, I wouldn't know. But that is sufficient for me not to pay.

The Referee: The only thing that stopped your company from paying this was the withhold orders?

Mr. Lorimer: He has testified that the withhold orders would stop him, but that there might be something in addition to that.

The Referee: He says his auditor approved it

(Testimony of Robert M. Crawford.)

and recommended it for payment. Why would he do that if he had any other reason to refuse payment?

The Witness: So far as the termination claims are concerned, Your Honor, even though we would recommend it to the Maritime Commission, a certain amount, we still could not pay that until we had first secured the approval of the Commission, and the contract settlement section to pay.

The Referee: But so far as your investigation here is concerned, the claim is proper; it is so stated.

The Witness: Yes, that is correct, Your Honor.

Mr. Klinger: You are speaking from the point of view of the records.

The Witness: That is right.

Mr. Klinger: That are in your custody and under your supervision.

The Witness: That is right.

Mr. Klinger: You have no information where you would have known of any fraud which may have been perpetrated by Brisbane in performance of this contract? That wouldn't appear on your records?

The Witness: That wouldn't appear on my records at all because I only have accounting records, bookkeeping records, in other words.

Mr. Klinger: So that even if the accounting department, let us say in this case, showed an open book account of $20,000, the company still, even though the books show that that would be due, the

results of the prosecutions. However, by that suggestion I don't mean to stipulate that I would feel that those items are material or admissible or anything, but hearsay as to this proceeding, and secondly, I would like to point out that Mr. McBurney has already testified in this Court, and he has testified that the services rendered and for which he made some nolo contendere plea, were according to him engineering services. So we won't be able to go to the point of any stipulation as to the Government's version of why Mr. McBurney plead as he did to the criminal charges, but if you want to obtain in the record your offer of proof on what took place as to the charges and convictions, that is something else. I will be glad to stipulate.

The Referee: I don't think it would be fair to anybody, much less to me, to ask me to conclude that every claim that this man made was dishonest or fraudulent, because he was convicted down in the criminal court on other matters probably. I don't know what the charges were down there. In other words, this old fallacy is omnibus. I don't go for that. A man may be dishonest in one transaction and absolutely honest in another.

Mr. Klinger: That is perfectly true, Your Honor. That isn't what we were driving at. The point is, and I hope I can make it clear—you see, that Kickback Statute or Anti-Kickback Statute, whatever you want to call it, provides in substance, if I am in error on any of this I can be corrected, that where an employee, such as McBurney, of a prime

contractor, such as Consolidated Steel, receives any gratuity or payment or compensation from any sub-contractor for the business which is being given to that sub-contractor, then it is presumed by the statute that the United States which has to reimburse the prime contractor under a cost plus fixed fee contract, ultimately paid that gratuity or that kickback and that therefore the statute provides the United States may order the withholding order, the prime contractor to withhold from such sub-contractor any such amount. It doesn't have to be in the particular contract, because by that time that contract is out of the way. It is out of the subsequent moneys which come to the sub-contractor from the prime contractor that the United States is given the right to order the withholding order. So the purpose was simply to show, or of course it appears in the correspondence in these withholding orders, that they are proceeding on the basis of the statute, but it was simply to buttress that to show that there was a substantial basis for the withholding order and that the withholding order is in accordance with the statute. That was all. It was not to charge any fraud in any particular sub-contract.

The Referee: Let me ask you one simple question. Is there no way known to Washington or any of the great minds back there whereby they may not determine whether or not there was any fraud or false claims put in in these matters? Can that not be determined by these great men back in Washington?

Mr. Klinger: Well, I don't know.

The Referee: If so, how long would it take?

Mr. Klinger: No, Your Honor, I don't think I have made myself clear on it because as soon as there is fraud in the relationship between a prime contractor and a sub-contractor of that kind, then the United States is entitled, in order to recover such gratuities, which were paid, and which were ultimately reimbursed the prime contractor for, to withhold through the prime contractor from such sub-contractor, the Government is satisfied that there is fraud here. We have no question about that.

The Referee: Is the Government satisfied that they don't owe this Brisbane Company anything?

Mr. Klinger: The Government is satisfied and our position is very plainly this, that the amount which the Government is entitled to withhold under the Kickback Statute is greater than the amounts which Brisbane claims from Consolidated Steel. It is sort of a set-off proposition.

The Referee: Has that been determined by any accountant or anybody back in Washington?

Mr. Klinger: You have the amounts of $20,000 here and let's see, $11,000, or all told, they claim $40,000. I merely can give you the evidence that was gathered by the bureau and was presented, and that was that Brisbane who acted as sort of the central figure in this conspiracy, received from the group who were handling the collusive bidding, $128,000, and that he kicked back to McBurney half of that. That was their deal. So that you have got McBurney getting more than $60,000 and the total

amount of the fraud in actual dollars of payment being $128,000.

The Referee: Was that actually paid by the Government, $128,000?

Mr. Klinger: Under the Kickback Statute—well, yes, it would be paid by the Government in the same sense as the $60,000 or $65,000 that McBurney received, because the theory of all of these fraud cases is that when these people put in their collusive bids, knowing they had a kickback of ten per cent to Brisbane, who was dividing with McBurney, their bids were increased by the amount which they had to kick back. That is the theory of it.

Mr. Lorimer: Your Honor, wholly apart from the Kickback Act, presuming that there were no Kickback Act involved in this case at all, Consolidated Steel, on the basis of this fraud would have a perfectly valid defense against the sub-contractor Brisbane. Presume an ordinary situation where Consolidated Steel makes a contract with Brisbane. The Government is not involved. Brisbane bribes the Consolidated Steel agent and pays him substantial amounts, and as a result, collects more on its contract than it was justly entitled to. That is pure fraud and it is a perfectly valid defense to any action brought under those contracts.

The Referee: Let me ask you one question. In these contracts, was there not a definite figure mentioned, or was it an elastic contract that might be expanded or contracted at the desire of either parties? Were they for definite sums?

Mr. Gendel: Flat sums in each instance, Your Honor.

Mr. Klinger: In each instance, each of the purchasers to whom McBurney awarded, either to Brisbane or the others, in the group, were for a set amount, but of course the bidding being collusive, and what they called courtesy bids, being put by others in the group, the bid was by whatever they wanted it to be.

The Referee: Let me ask you this. Was it obligatory upon Consolidated Steel to accept those bids? Did Consolidated Steel have any concern with what it cost the Government?

Mr. Klinger: Certainly, McBurney was the man they relied on; their own agent was the buyer. He had a little game of his own going on.

The Referee: Was he the man who finally passed upon the letting of these contracts?

Mr. Klinger: Yes, he prepared the abstract of the bids that were put in, the amounts, and then it showed who was the low bidder and who the higher bidder and the bidder who was to recover and that was what was passed on.

The Referee: What was McBurney's title with this company?

Mr. Klinger: He was the buyer for outside fabrication.

Mr. Gendel: Mr. McBurney testified at some length in this Court. I don't think that would be admissible any more than what occurred at these various criminal hearings. As Your Honor knows, a defendant will very often make so-called deals

with the Government for different reasons than the specific facts involved in what would be a civil action. Your Honor will recall that Mr. McBurney testified he was not convicted, that he entered a plea which was nolo contendere, that all that happended to him was that he received a fine, but it was Mr. Brisbane who was convicted and went to prison.

Mr. Klinger: Mr. McBurney served nine months in the jail, also.

The Referee: Nolo contendere is a plea of guilty, and stripped of all Latin phraseology, it means "I am guilty, but I didn't mean to do it."

Mr. Gendel: Brisbane went to Tucson, Arizona, for a couple of years. When McBurney testified he denied that he had any such back door arrangement with Mr. Brisbane because if Your Honor recalls, we were interested in attempting to recover from McBurney the $65,000 that the Government is talking about, and if Your Honor will recall, that is why we got Mr. McBurney up here under 21-A. McBurney's testimony was that he had a job that Consolidated paid him, I think it was $300 or $400 a month, not as a purchasing agent in connection with any of these transactions, but as he said, the services that he rendered involved in any dealings with Brisbane were the services of an independent engineer in helping set up bids which were submitted, that the letting of the bids, according to his testimony, had nothing to do with him or his authority. Now, that was his unequivocal testimony. I did not participate in the criminal trials which I

understood went on for some days. Apparently in the criminal proceedings the only ones convicted were Brisbane, by the finding of the Court, and McBurney by his plea of nolo contendere. The rest of these gentlemen apparently were not involved.

Mr. Klinger: Mr. Wilcox was convicted and Mr. Hanson Brown was convicted.

Mr. Gendel: Not on these.

Mr. Klinger: They were.

Mr. Gendel: I don't want to argue with the Government on convictions. I know that Simpson and Stone was acquitted.

Mr. Klinger: Yes.

Mr. Gendel: Here is a letter of May 19, the second page showing the following sub-contractors paid a total of $128,499.38 to Brisbane, of which McBurney received $65,000. That includes B & L Machine Tool and Die, Davenport Manufacturing Company, Commercial Piping and Engineering Company, and Wire and Metal Manufacturing Company. Apparently as far as those deals were concerned, there was no direct contractual relationship between Consolidated Steel and Brisbane and Company at all. So that if there is any attempt on the part of either the Government or Consolidated Steel to set up any compliance with even the limited provisions of the Anti-Kickback Act, you can't do it by merely referring to criminal charges or criminal convictions. That is one phase of it. The second phase is that I think that Consolidated by

its action has long ago become estopped from attempting to set up any defense other than the stop order which was obtained from the Government. We must remember, Your Honor, that this matter has been pending and the Trustee has been trying to collect for two years now. This is the first time that we have heard a theory of fraud urged not plead by an answer to defend at any time. This is the third petition of this character that has been filed. This is the first time we hear that they might contend fraud generally in connection with the execution of the contract. Now, since the letting of the contract and the making of these so-called reprehensible payments and the present time, a bankruptcy has intervened. Creditors have extended credit to Brisbane and Company, not Brisbane personally. We have in this case a division of assets and liabilities. We have two entities. We have Brisbane and Company, a limited partnership, and creditors extending their credit to this entity. We have another entity, Eugene C. Brisbane, individually. Now, if there were any rights involved in this situation, it wouldn't be generally against a company as such. It would be against the individual who participated in the reprehensible activities for which Bribane was convicted. Now, mind you, Your Honor, I have no sympathy for Mr. Brisbane, if he was guilty. We are not standing on that position at all.

The Referee: What do you think I can do here?

Mr. Gendel: Here is the dual position that we take, Your Honor. No. 1, as far as the Statute

itself is concerned, it is a very short statute and it is attached on the certificate for review. I don't know whether it is in the file before Your Honor or not. It is typed and is just a page and a quarter.

The Referee: Is this matter on review?

Mr. Gendel: No. But once it went up, you will recall, with the United States objecting to jurisdiction, which objection was a close one, and we felt when it was sent back to Your Honor that we would eliminate the objection to jurisdiction by just bringing the proceedings against Consolidated and now the United States has intervened and we have no problem of jurisdiction as to the United States as a party. Now, directing Your Honor's attention for a moment to the Act itself, it is a very stern act and I think it was drawn by the members of Congress in their anger at discovering that certain of our contractors and sub-contractors were attempting to defraud the Government. Whoever drafted it disregarded, as I see it, all rules of due process of law. They didn't provide, for example, Your Honor, any notice to the sub-contractor, let us say, Brisbane and Company, in this instance that the money was being withheld or why it was being withheld. They didn't provide any protection for the rights of creditors in this particular case, as a prime example, of the intervention of the rights of innocent persons without any place or means of form to present their rights to ascertain whether or not they have money coming through the agency of the Bankruptcy Court or whether the Government correctly can stop the payment of the money.

Then, as far as the Act itself is concerned, it doesn't directly provide any form in which you can argue these matters out. It does provide that the United States could urge by a set-off or by other means or by an action in an appropriate court of the United States, a right to collect their money. The United States, however, hasn't seen fit to do any of those things. The Trustee in this instance, through our office, wrote in early 1947 and presented opposition and asked them to do something, either lift their restriction and allow the matter to be adjudicated before Your Honor or else take some proceeding so that we could litigate the rights of the innocent creditors involved here. Now, the Government didn't do that in spite of the Act containing that clause in it. Now, I heard some discussion in writing in our other arguments that there is an administrative procedure act, but I don't see that that has any bearing. It hasn't been followed by either the Government or Consolidated Steel. The Anti-Kickback Act, Your Honor, was passed in March, 1946. The Administrative Procedure Act was passed in June of 1946. I don't think they have any relationship—and if Your Honor were to read that statute carefully, I think it would create an immediate feeling in the mind of your Honor that there is no due process of law involved in allowing a Government agency, no matter how reprehensible the acts of one or other parties would be, to merely send a letter to a party owing money saying stop, and that according to the statute, ending the rights of the parties.

The Referee: I don't think that can be so. You can't write letters and state rights and wrongs.

Mr. Gendel: That is all that has been done in this case, as is evidenced by the testimony and is evidenced by the position of the Government, that as far as they are concerned, that is all they have to do.

The Referee: No, I don't go along with them on that. I think they should have long before this done something to assert their rights.

Mr. Gendel: I feel that way about it; I think the Court should order the payment of the amount that is on question. That is the $20,390.82, and continue the question with reference to the contract termination amounts in order not to unfairly penalize Consolidated and give Mr. Klinger and Mr. Lorimer and ourselves a chance to take care of that by correspondence and stipulation, which I think we can do. I think that would be the only fair way in which to handle the rights of creditors, including the United States of America, which is a sizable creditor, keeping in mind, Your Honor, that we do have in this case a division of entities, Brisbane and Company, which the business creditors dealt with, and which had included not only Brisbane, but limited partners and Eugene C. Brisbane, personally, who then took this money nefariously and put it in his pocket, and by his taking had created a personal liability to Uncle Sam for that.

Mr. Klinger: So as to keep the record straight, I don't want to get into a long-winded discussion. We argued this once before at length. I will say first that as to the division of entities, the Anti-

Kickback Statute refers to the sub-contractor and I think that would cover the business entity that Mr. Gendel was referring to. And then may I say that since we were withholding our written objections to the Order to Show Cause until the evidence was in, Your Honor wanted an opportunity to hear the case before hearing anything about the law, and before Your Honor makes a ruling on this matter, may we then for the record persent our objections to the granting of the Order to Show Cause so that the record will be straight on that point?

The Referee: Yes, sir.

Mr. Lorimer: Consolidated Steel's main point hasn't been argued.

The Referee: I don't think Consolidated has much rights. You recommended the payment of it. Now you want to come back on fraud. I don't think you have any standing at all. You recommend to the Government that these be paid; that is what he said on the stand here under oath. I heard him.

Mr. Lorimer: He said that Consolidated audited the figures and as far as the records showed, that was the correct payment, but the record doesn't show the fraud which took place.

The Referee: I am not going to let you drag that in here.

Mr. Lorimer: In any event, Your Honor, this matter involving the constitutionality of the Anti-Kickback——

The Referee: I am not ruling on the constitutionality of anything. I am saying that your company wrote a letter and said as far as we know

these amounts are correct and should be paid. Now, they have got to stand on that recommendation. Two years later they want to come back and say this fellow was convicted and we want to plead fraud. I am not going to hear that at all.

Mr. Lorimer: In other words, you are making an order for payment despite the Anti-Kickback Act?

The Referee: I am going to make an order that you pay $20,390.82. You can take a review on that if you want to.

Mr. Lorimer: I would like to file this memorandum of points and authorities.

The Referee: I think you ought to do that. You sit on your hands for two years and then say I can write a letter and deprive people of their money.

All right. You may draw that type of an order for $20,390.82, Mr. Gendel.

Mr. Gendel: That reserves the other phase of it for processing by Mr. Klinger and Mr. Lorimer and myself.

The Referee: That is right.

Mr. Gendel: Thank you.

State of California,
County of Los Angeles—ss.

I, P. A. Duran, Official Court Reporter, do hereby certify that the foregoing comprise a true and correct transcript of the proceedings had in the above-entitled matter.

Dated this ninth day of July, 1949.

/s/ P. A. DURAN,
Official Court Reporter.

[Endorsed]: Filed July 14, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 108, inclusive, contain the original Certificate of Referee on Review re April 12, 1949, Order; Petition for Order to Show Cause re Consolidated Steel Corporation; Order to Show Cause; Petition on Behalf of the United States for Leave to Intervene; Objections of United States to Order to Show Cause; Stipulation; Findings of Fact, Conclusions of Law and Order Granting Trustee's Petition Against Consolidated Liquidating Corporation; Findings of Fact, Conclusions of Law and Order on Petition for Segregation of Assets and Claims; Applications for Extension of Time Within Which to Petition for Review of Order; Notice; Petitions for Review; Referee's Supplemental Certificate on Review re April 12, 1949, Order; Transcript of Hearing on Order to Show Cause Held April 22, 1948; Memorandum of Points and Authorities of Consolidated Steel Corporation; Referee's Second Supplemental Certificate on Re-

view re April 12, 1949, Order; Trustee's Exhibits 1 and 2; Order re Motion to Suspend Enforcement of Referee's Order; Order on Review of Referee's Order Dated April 12, 1949, etc.; Notice of Appeal and Designation of Record on Appeal and full, true and correct copies of Original Petition in Proceedings Under Chapter XI; Approval of Debtor's Petition and Order of Reference; Order of Adjudication and Order of Adjudication and Order to File Schedules which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $3.85 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24th day of July, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12624. United States Court of Appeals for the Ninth Circuit. George T. Goggin, as Trustee of the Estate of Eugene C. Brisbane, Individually, and Brisbane & Company, a Limited Partnership, Bankrupts, Appellant, vs. Consolidated Liquidating Corporation and United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 26, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12624

GEORGE T. GOGGIN, Trustee in Bankruptcy of BRISBANE & COMPANY, a Limited Partnership, etc., Bankrupts,

Appellant,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

Appellant, George T. Goggin, Trustee in Bankruptcy of Brisbane & Company, a limited partner-

ship, bankrupt, and Eugene C. Brisbane, individually, a bankrupt, intends to rely on appeal on the following points:

1. The District Court erred in reversing the Order of the Referee granting the relief prayed for by the appellant-trustee in his Petition for Order to Show Cause filed with the Bankruptcy Court on March 31, 1948.

2. The District Court erred in holding that the bankruptcy court did not have summary jurisdiction over the within dispute.

3. The District Court erred in holding that the Anti-Kickback Act of March 6, 1946 (60 Stat. 37), is applicable in the within proceedings.

Dated: September 28, 1950.

/s/ MARTIN GENDEL,
Of Counsel for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 29, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD TO BE PRINTED

Appellant, George T. Goggin, Trustee in Bankruptcy of Brisbane & Company, a limited partnership, bankrupt, and Eugene C. Brisbane, individually, a bankrupt, does hereby designate as the portions of the record, proceedings and evidence to be printed in connection with the within appeal, all of the record, proceedings and evidence certified to the Clerk of this Court by the Clerk of the District Court in connection with the said appeal.

In addition to the foregoing portions of the record on appeal, appellant designates for printing this Designation of Record and the Statement of Points Upon Which Appellant Intends to Rely filed with this Court simultaneously herewith.

Appellant hereby requests that all of the aforementioned portions of the record, proceedings and evidence before the District Court and this Honorable Court be printed as material to the consideration of the appeal.

Dated: This 28th day of September, 1950.

/s/ MARTIN GENDEL,
Of Counsel for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 29, 1950.